TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1946 47

No. 967 38

JOSEPH F. MAGGIO, PETITIONER,

vs.

RAYMOND ZEITZ, AS TRUSTEE IN BANKRUPTCY OF LUMA CAMERA SERVICE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JANUARY 31, 1947.

CERTIORARI GRANTED MARCH 10, 1947.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 967

JOSEPH F. MAGGIO, PETITIONER,

vs.

RAYMOND ZEITZ, AS TRUSTEE IN BANKRUPTCY OF LUMA CAMERA SERVICE, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

INDEX

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 11, 1947.

[fol. 1]

IN UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt; JOSEPH F. MAGGIO, Appellant; RAYMOND ZEITZ, Trustee-Appellee

STATEMENT UNDER RULE XIII

This proceeding, to punish the appellant for contempt, was commenced by the service on the appellant of the Petition and Order to Show Cause on or about December 8th, 1944. The matter came on to be heard on April 10, 1945, before Hon. Samuel Mandelbaum, D. J., and resulted in an order, dated April 30, 1945, granting the application, from which this appeal is taken.

Max Schwartz, as successor of Duberstein & Schwartz, Esqs., 26 Court Street, Brooklyn, N. Y., appears for the appellant.

Glass & Lynch, Esqs., 170 Broadway, New York City, appear for the appellee.

There has been no change of parties or attorneys except that the appellant is now represented by Max Schwartz, the successor of the firm of Duberstein & Schwartz, his former attorneys.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

ORDER TO SHOW CAUSE

(To Punish Joseph F. Maggio, for Contempt, etc.)

Upon the annexed petition of Raymond Zeitz, Trustee in Bankruptcy herein, duly verified the 7th day of December, 1944, the certificate of contempt of Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, the petition and exhibits thereto annexed, all on file with the Clerk of this court, upon the turnover order of said Referee dated August 9, 1943, upon the order of Honorable Vincent L. Leibell, dated De-

cember 28, 1943, affirming in all respects the order of said Referee, upon the mandate of the United States Circuit Court of Appeals, for the Second Circuit, dated November 13, 1944, affirming the said order of the District Court, upon the order on said mandate dated November 28, 1944, all of which papers are on file in the Office of the Clerk of this court, and upon the record of all proceedings had herein.

Let Joseph F. Maggio show cause before me or a Judge of this Court, at a Bankruptcy Motion Part thereof, to be held at the United States Courthouse, Foley Square, in the Borough of Manhattan, City of New York, on the 13th day of December, 1944, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, why an order should not be made and entered punishing the said [fol. 3] Joseph F. Maggio for contempt of Court for wilfully disobeying or failing to comply with the order made herein by the said Referee in Bankruptcy dated August 9, 1943, as affirmed by the order of Honorable Vincent L. Leibell, dated December 28, 1943, as further affirmed by the mandate of the United States Circuit Court of Appeals, for the Second Circuit, dated November 13, 1944, in that said Joseph F. Maggio failed to turn over and deliver to the Trustee herein certain merchandise in his possession or under his control, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business in the amount and value of $17,500 or the proceeds thereof, as required by said order, and for wilfully prejudicing, impeding and impairing the rights of the creditors and Trustee herein, and why an order should not be made committing the said Joseph F. Maggio until he shall turn over and deliver to the Trustee herein the aforementioned property or proceeds thereof, and granting to the Trustee such other, further and different relief as may be just and proper in the premises.

Let service of a copy of this order to show cause upon Joseph F. Maggio or his attorney on or before the 8th day of December, 1944, be deemed good and sufficient service.

Dated, New York, N. Y., December 7, 1944.

William Bondy, United States District Judge.

[fol. 4] IN UNITED STATES DISTRICT COURT

PETITION

To the Honorable Judges of the United States District Court, for the Southern District of New York:

The petition of Raymond Zeitz respectfully alleges:

1. That he is the Trustee herein, duly qualified and acting as such.

2. That after due notice and hearing, a turnover order directed to Joseph F. Maggio, President of the bankrupt, was duly made on August 9, 1943 by Honorable Oscar W. Ehrhorn, Referee in Bankruptcy, a true copy of which order is annexed hereto and marked Exhibit "A", the original of which is on file with the Clerk of this Court.

3. That in substance, the said order of August 9, 1943 ordered and directed the said Joseph F. Maggio, within ten days after service upon him of a certified copy of said order, to turn over and deliver to the Trustee herein merchandise belonging to the bankrupt estate of the amount and value of $17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise.

4. That thereafter and on August 16, 1943, a certified copy of said turnover order was served on the said Joseph F. Maggio, as appears from the affidavit of Ben Bassin, a copy of which is annexed hereto and marked Exhibit "B", the original of which is on file with the Clerk of this Court.

5. That thereafter the respondent, Joseph F. Maggio, filed a petition for review of the turnover order of Referee Oscar W. Ehrhorn and on December 28, 1943, Vincent L. [fol. 5] Leibell, United States District Judge, made an order affirming the said turnover order and denying the petition for review. A true copy of said order is annexed hereto and marked Exhibit "C", the original of which is on file with the Clerk of this court.

6. That thereafter, the respondent, Joseph F. Maggio, appealed to the Circuit Court of Appeals, for the Second Circuit, from the said order of the District Court and on November 13, 1944, a mandate of that Court was issued ordering that the order of the District Court be affirmed.

On November 28, 1944, an order was signed by Honorable John Bright, United States District Judge, and entered in the Office of the Clerk of this Court, making the mandate of the Circuit Court the order and judgment of the District Court. A copy of said order is annexed hereto and marked Exhibit "D".

7. That on December 4, 1944, Referee Oscar W. Ehrhorn signed a certificate of contempt in which he certified that said Joseph F. Maggio has failed to comply with the turnover order of the Referee dated August 9, 1943 and recommended that said Joseph F. Maggio be punished for contempt for failure to comply with said order. The original certificate of contempt and the petition and exhibits annexed thereto are on file with the Clerk of this court. Annexed hereto are true copies of the certificate of contempt marked Exhibit "E" and of the petition for said certificate marked Exhibit "F".

8. That said Joseph F. Maggio has wholly failed to comply with the said turnover order of the Referee dated August 9, 1943, as affirmed by the United States District Court and the Circuit Court of Appeals, for the Second Circuit, and is wilfully prejudicing, impairing and impeding the [fol. 6] rights of the creditors and the Trustee herein, and is wilfully and deliberately disobeying the orders of this Court.

9. That said Joseph F. Maggio has appeared by counsel throughout the proceedings hereinbefore mentioned and was represented on the petition to review before Judge Leibell and on the appeal to the Circuit Court of Appeals by Duberstein & Schwartz, Esqs., 26 Court Street, Brooklyn, New York.

10. That no previous application has been made for the relief herein sought.

Wherefore, your petitioner respectfully prays for an order committing the said Joseph F. Maggio for contempt of Court until he shall have complied with the aforesaid turnover order.

Dated, New York, N. Y., December 7, 1944.

(Sgd.) Raymond Zeitz, Trustee-Petitioner.

(Verified December 7, 1944.)

[fol. 7] EXHIBIT "A" TO PETITION

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(No. 80681)

SIR:

Please take notice, that an order of which the within is a true copy will be presented for settlement and signature herein to Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, at his office at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York, on the 2nd day of August, 1943, at ten o'clock in the forenoon.

Dated, New York, N. Y., July 29, 1943.

Yours, etc., Glass & Lynch, 170 Broadway, Borough of Manhattan, City of New York; Benjamin H. Wicksel, 345 Madison Avenue, Borough of Manhattan, City of New York, Attorneys for Trustee.

To: Abraham Burstein, Esq., Attorney for Respondent, Joseph F. Maggio, 295 Madison Avenue, New York, N. Y.

[fol. 8] (Turnover Order)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In Bankruptcy

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(No. 80681)

At New York, in the aforesaid District, on the 9th day of August, 1943.

The Trustee herein having made due application to this Court by order to show cause dated January 18, 1943 for an order requiring the respondent, Joseph F. Maggio, to turn over and surrender to said Trustee certain merchandise

belonging to the estate of the bankrupt, or the proceeds of the sale thereof, and said application having duly come on to be heard before me on May 18th, 1943 and June 4th, 1943,

Now, on reading and filing said order to show cause and the petition of Raymond Zeitz, the Trustee herein, verified January 7th, 1943, thereto annexed, the answer of the respondent verified May 17th, 1943 and the testimony adduced by both parties on the return of said order to show cause; and after hearing Glass & Lynch and Benjamin H. Wicksel, attorneys for the Trustee, in support of said application and Abraham Burstein, attorney for the respondent, in opposition thereto; and due deliberation having been had [fol. 9] thereon; and on filing the Findings of Fact and Conclusions of Law dated August 9th, 1943, and the memorandum of the undersigned Referee dated July 16th, 1943; and it appearing to my satisfaction that the Trustee established by clear and convincing evidence that the merchandise hereinafter described, belonging to the estate of the bankrupt, was knowingly and fraudulently concealed by the respondent from the Trustee herein and that said merchandise is now in the possession or under the control of the respondent, it is, on motion of Glass & Lynch and Benjamin H. Wicksel, attorneys for the Trustee,

Ordered, that the Trustee's said application be, and the same hereby is granted to the extent hereinafter set forth; and it is further

Ordered, that Joseph F. Maggio, the respondent herein, be and he hereby is ordered and directed, within ten (10) days after service upon him of a certified copy of this order, to turn over and deliver to Raymond Zeitz, the Trustee herein, merchandise belonging to the bankrupt estate of the amount and value of $17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 10] EXHIBIT "B" TO PETITION

(Affidavit of Service of Certified Copy of Turnover Order)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(Joseph F. Maggio, Respondent)

STATE OF NEW YORK,
County of New York, ss:

Ben Bassin, being duly sworn, deposes and says that he is over the age of 21 years. And that on the 16th day of August, 1943 at 161-40 Normal Road, Jamaica, New York, he served the annexed turnover order upon Joseph F. Maggio, the respondent herein, by delivering to and leaving a certified copy thereof with said Joseph F. Maggio.

Deponent further says, that he knew the person so served as aforesaid to be the person mentioned and described in the said order.

Deponent is not a party to the action.

Ben Bassin.

Sworn to before me this 24th day of August, 1943.
George E. McMullen, Notary Public, Kings County.

[fol. 11] EXHIBIT "C" TO PETITION

(Order Affirming Referee Ehrhorn's Turnover Order of August 9, 1943 and Denying Petition for Review)

At a Bankruptcy Motion Term of the United States District Court, Held in and for the Southern District of New York, at the United States Courthouse, Foley Square, Borough of Manhattan, New York City, on the 28th Day of December, 1943

Present: Hon. Vincent L. Leibell, United States District Judge.

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

Joseph F. Maggio, President of the Bankrupt, having petitioned this Court for a review of an order made in these proceedings by Referee Oscar W. Ehrhorn, dated August

9, 1943, which directed said Joseph F. Maggio to turn over to the Trustee in Bankruptcy herein merchandise belonging to the bankrupt estate of the amount and value of $17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the Bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise, and the said petition for review having duly come on to be heard before me on the 24th day of November, 1943, and after hearing Duberstein & Schwartz, by Max Schwartz, in support of the [fol. 12] petition to review, and Glass & Lynch and Benjamin W. Wicksel, attorneys for the Trustee, by Bernard Alpert, in opposition thereto, and due deliberation having been had thereon,

Now, upon reading and filing the petition to review of Joseph F. Maggio, dated and verified the 19th day of August, 1943, the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated August 9th, 1943, the certificate on review of said Referee, dated August 24th, 1943 and filed, and upon all the proceedings had before the said Referee, as appears from his said certificate, and upon reading and filing the opinion of this Court, dated December 13th, 1943,

Now, on motion of Glass & Lynch and Benjamin H. Wicksel, attorneys for the Trustee, it is

Ordered, that the said petition for review filed by Joseph F. Maggio be, and the same hereby is denied and dismissed and the order of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy, dated August 9th, 1943, be, and the same hereby is in all respects affirmed.

Vincent L. Leibell, U. S. D. J.

[fol. 13] EXHIBIT "D" TO PETITION

(JUDGMENT)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

JOSEPH F. MAGGIO, Respondent-Appellant,

against

RAYMOND ZEITZ, Petitioner-Appellee

Joseph F. Maggio, having appealed to the United States Circuit Court of Appeals, for the Second Circuit, from an order made herein dated December 28, 1943 and entered in the Office of the Clerk of the United States District Court, for the Southern District of New York, on that day, confirming, upon appellant's petition for review, an order of Referee Oscar W. Ehrhorn directing appellant to turn over to the Trustee-Appellee certain merchandise or the proceeds thereof, cash, and certain books and records of the bankrupt, and said Court having issued its mandate dated November 13, 1944, wherein it was ordered, adjudged and decreed that such order of said District Court be affirmed with costs, assessed in the sum of $31.45 in favor of Raymond Zeitz, as Trustee-Appellee.

Now, on motion of Glass & Lynch and Benjamin H. Wicksel, attorneys for Raymond Zeitz, as Trustee-Appellee, and upon the mandate of the United States Circuit Court of [fol. 14] Appeals, for the Second Circuit, dated November 13, 1944, it is hereby Ordered, Adjudged and Decreed:

1. That the mandate in this cause of the United States Circuit Court of Appeals, for the Second Circuit, dated November 13, 1944 and filed in the Office of the Clerk of the United States District Court, for the Southern District of New York, be, and the same hereby is made the judgment and order of this Court; and

2. That Raymond Zeitz, as Trustee-Appellee, have judgment against Joseph F. Maggio for the sum of $31.45 costs, as taxes herein.

Dated, New York, N. Y., November 28, 1944.

Approved,

John Bright, U. S. D. J.

Exhibit "E" to Petition

(Referee's Certificate of Contempt)

United States District Court, Southern District of New York

In the Matter of Luma Camera Service, Inc., Bankrupt

(No. 80681)

I, Oscar W. Ehrhorn, one of the Referees in Bankruptcy of this Court, respectfully report and certify that on August [fol. 15] 9th, 1943, I made an order requiring Joseph F. Maggio to turn over and deliver to the Trustee in Bankruptcy in this proceeding, within ten (10) days after service of a certified copy of said order upon him, certain merchandise belonging to the bankrupt estate of the amount and value of $17,300, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise. All of said merchandise or the proceeds thereof are in the possession or under the control of said Joseph F. Maggio, as appears from the testimony on file and the proceedings had herein. A copy of said order, the petition of Raymond Zeitz, Trustee, duly verified, and the affidavit of Ben Bassin, verified the 24th day of August, 1943, are filed herewith and made part hereof.

I further certify that said Joseph F. Maggio has wholly failed to comply with said order.

I further find that said Joseph F. Maggio is in contempt of Court and therefore recommend that he be punished for contempt until he shall have turned over and delivered to the Trustee in Bankruptcy herein, certain merchandise belonging to the bankrupt estate of the amount and value of $17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business, or the proceeds of the sale of said merchandise.

All of which is respectfully submitted.

Dated, New York, N. Y., December 4, 1944.

Oscar W. Ehrhorn, Referee in Bankruptcy.

[fol. 16] EXHIBIT "F" TO PETITION

(Petition for Certificate of Contempt)

UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(No. 80681)

To Hon. Oscar W. Ehrhorn, Referee in Bankruptcy:

The petition of Raymond Zeitz respectfully shows and alleges:

1. That he is the Trustee herein, duly qualified and acting as such.

2. That heretofore by order of the Referee herein, dated August 9, 1943, Joseph F. Maggio was ordered and directed, within ten (10) days after service upon him of a certified copy of said order, to turn over and deliver to your petitioner, as Trustee herein, merchandise belonging to the bankrupt estate of the amount and value of $17,500, consisting of photographic equipment and supplies of the class and description commonly purchased and dealt in by the bankrupt in the regular course of its business or the proceeds of the sale of said merchandise.

3. That annexed hereto is a true copy of said order.

[fol. 17] 4. As appears from the annexed affidavit of Ben Bassin, sworn to August 24, 1943, a certified copy of said order was duly served on said Joseph F. Maggio on August 16, 1943.

5. That more than ten (10) days have elapsed since said Joseph F. Maggio was served with a certified copy of said order and that said Joseph F. Maggio has failed to obey said order and has failed to turn over and deliver to your petitioner, as Trustee herein, the aforesaid merchandise or the proceeds of the sale thereof, as directed by said order, or any part thereof.

6. That thereafter and on December 28, 1943, there was filed in the Office of the Clerk of this Court the order of Judge Vincent L. Leibell dated December 28, 1943, affirming

the turnover order and denying said Joseph F. Maggio's petition for a review thereof.

7. That thereafter, said Joseph F. Maggio having appealed to the United States Circuit Court of Appeals, for the Second Circuit, from the said order of the District Court affirming the aforesaid turnover order, the Circuit Court of Appeals, for the Second Circuit, by its mandate issued November 13, 1944 and on file in the Office of the Clerk of this Court, affirmed the order appealed from; that by order of this Court dated November 28, 1944 and filed in the Office of the Clerk of this Court, the said order of the Circuit Court of Appeals has been made the order of this Court.

Wherefore, your petitioner respectfully prays for a Certificate of Contempt of said Joseph F. Maggio for failure to obey the aforesaid turnover order.

Dated, New York, N. Y., December 4th, 1944.

Raymond Zeitz, Petitioner.

[fol. 18] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF EMANUEL LINHARDT, READ IN SUPPORT OF APPLICATION

STATE OF NEW YORK,
County of New York, ss:

Emanuel Linhardt, being duly sworn, deposes and says: I am an attorney associated with the firm of Glass & Lynch, which firm, together with Benjamin H. Wicksel, are attorneys for the Trustee in Bankruptcy in the above entitled proceeding.

I submit this affidavit for the purpose of supplementing the petition of Raymond Zeitz, Trustee in Bankruptcy herein, verified December 7, 1944, in support of his application to punish Joseph F. Maggio for contempt of Court. In said Trustee's petition it is alleged that the turnover order which said Joseph F. Maggio has refused to comply with was affirmed by the United States Circuit Court of Appeals. It is noteworthy that on February 5, 1945 the Supreme

Court of the United States denied certiorari on the application made by Joseph F. Maggio for review of the turnover order in that Court.

Emanuel Linhardt.

(Sworn to the 19th day of February, 1945.)

[fol. 19] IN UNITED STATES DISTRICT COURT

[Title omitted]

AFFIDAVIT OF JOSEPH F. MAGGIO, READ IN OPPOSITION TO APPLICATION

STATE OF NEW YORK,
City of New York,
County of Kings, ss:

Joseph F. Maggio, being duly sworn, deposes and says:

I am the respondent herein.

Answering the application of Raymond Zeitz, as Trustee, I allege:

That at the time of the entry of the turnover order herein on August 9th, 1943, I was employed by E. I. DuPont de Nemours & Co., at the foot of 39th Street, Brooklyn, New York, in a clerical capacity, at a net salary of $170 per month. At said time I was employed by the said company for two years, having commenced to work for the DuPont Company in August of 1941. I continued to work for the said company until November of 1944.

During the said period between August, 1941 and November of 1944, my sole source of income was the salary received as a result of my employment, which at no time exceeded the net sum of $170 per month.

[fol. 20] This salary so received by me was used for the support of my family, consisting of my wife, my youngest daughter Joan, age 16, and attending high school, and my mother-in-law Mary Topping, who resides with my family at 161-40 Normal Road, Jamaica, L. I. My mother-in-law, Mary Topping, is a woman 74 years of age, and in addition thereto, is practically blind and therefore incapable of supporting herself and dependent upon me for support.

From on and after August 9th, 1943, the date of the entry of the turnover order herein, and in fact for almost two

years prior thereto, neither I, nor any member of my family, had any property or assets. All our bank accounts were closed out prior to August of 1941, and at no time did I, or any member of my family, own any stocks, bonds, mortgages, or other personal property, or any real estate, except that my wife did own the premises wherein we reside, 161-40 Normal Road, Jamaica, L. I., which is subject to mortgages and the judgment lien of the Sterling National Bank, and which encumbrances are far in excess of the realizable value of the said property.

Neither I, nor any members of my family, have any means whatsoever to satisfy the claims and demands of the Trustee, or the turnover order entered against me on August 9th, 1943.

Since November of 1944, I have not been employed and in fact, since said date I have been incapable of engaging in any employment by reason of my physical condition.

The only means of support and income that I have had since November of 1944 have been monies received by me by way of sick leave benefits from my employer for the months of November, December, 1944 and January, 1945, which ceased and were terminated on January 31st, 1945, and in addition thereto insurance benefits of $25 a week. While I carry life insurance with disability benefits, the insurance companies have not yet recognized my claim for disability, [f. l. 21] but when the same is recognized, I should receive by way of disability benefits $250 per month.

For some time prior to November of 1944 I had been suffering from a heart condition which culminated in serious attacks in November of 1944, so as to completely disable me from thereafter engaging in any employment. Annexed hereto and made a part hereof is a sworn statement of Benjamin F. Maggio, M.D., my family physician, with respect to my physical condition. Since November of 1944 I have been treated by him at least twice a week and sometimes oftener.

I am perfectly willing to submit to a physical examination by any doctor employed by the Trustee, or designated by this Court, to verify and confirm the statements made by my physician respecting my physical condition.

Wherefore, I respectfully pray that the motion be denied.

Joseph F. Maggio.

(Sworn to the 16th day of February, 1945.)

[fol. 22] EXHIBIT "A" ATTACHED TO FOREGOING AFFIDAVIT

Benjamin F. Maggio, M. D., 691 Bushwick Avenue
Brooklyn, N. Y.

Feb. 9th, 1945.

This is to certify that Joseph Maggio has been under my professional care for the past 4 years for a heart complaint. During the past year, his symptoms have become greatly aggravated and since November, 1944 has given evidence of suffering from angina attacks due to serious coronary artery deficiency. The slightest exertion, even walking, has precipitated serious and dangerous heart attacks. Any emotional stress has also acted similarly. Electro cardiogram studies of his heart have corroborated the diagnosis. This is a serious condition requiring a special and complicated regimen of diet, rest-treatment and freedom from all anxiety over a long period of time. Emotional strain particularly may cause serious consequences.

Benj. F. Maggio, M. D.

Sworn to before me this 9th day of February, 1945.
Isidore J. Bronstein, Queens Co., Notary Public;
Queens Co., Clks. No. 2501, Reg. No. 201B5. Term
Expires March 30th, 1945.

[fol. 23] IN UNITED STATES DISTRICT COURT

[Title omitted]

REPLY AFFIDAVIT OF EMANUEL LINHARDT, READ IN SUPPORT OF APPLICATION

STATE OF NEW YORK,
County of New York, ss:

Emanuel Linhardt, being duly sworn, deposes and says:

I am an attorney associated with the firm of Glass & Lynch, which firm is acting as co-counsel to the Trustee in Bankruptcy herein.

I submit this affidavit in reply to the affidavit of Joseph F. Maggio submitted in opposition to the motion made by said Trustee in Bankruptcy to punish said Joseph F. Mag-

gio for contempt of court for failure to comply with the turnover order made by the Referee in Bankruptcy and confirmed in this Court, the Circuit Court of Appeals, and the Supreme Court of the United States.

Said answering affidavit is manifestly insufficient on its face and sets forth no facts which would warrant this Court in extending to said Joseph F. Maggio any further consideration for his refusal to comply with said turnover order. The facts set forth in said answering affidavit with respect to the earning power of the respondent are wholly [fol. 24] immaterial and irrelevant to the issues raised by the instant motion. It has been determined in all Courts that the respondent has refused to turn over merchandise having a value of $17,500. The respondent has improperly and wrongfully appropriated said merchandise according to the findings of the Referee in Bankruptcy, and he should be required to restore the same to the Trustee in Bankruptcy or suffer the consequences of his contumacious disregard for the orders of the Referee in Bankruptcy and of this Court.

The additional ground set forth in the answering affidavit in opposition to said motion concerning the physical condition of the said Joseph F. Maggio is likewise utterly insufficient on its face. There is submitted a brief statement by one Benjamin F. Maggio, M. D. that Joseph F. Maggio has been under his professional care for a "heart complaint". No effort has been made to corroborate the alleged "heart complaint" by the independent findings of a wholly disinterested heart specialist. At the very least this requirement should be met by the respondent, such examination to be made by a specialist designated by the Court at respondent's expense.

Wherefore, it is respectfully prayed that this motion be granted and the respondent, Joseph F. Maggio, committed for contempt of court until he shall have complied with said turnover order.

Emanuel Linhardt.

(Sworn to the 19th day of March, 1945.)

[fol. 25] IN UNITED STATES DISTRICT COURT

[Title omitted]

SUPPLEMENTAL AFFIDAVIT OF JOSEPH F. MAGGIO, READ IN OPPOSITION TO APPLICATION

STATE OF NEW YORK,
City of New York,
County of Kings, ss:

Joseph F. Maggio, being duly sworn, deposes and says:

I am the respondent herein.

Supplementing my affidavit of February 16th, 1945, and for the purpose of apprising the Court of what has transpired since the argument of the motion, I allege:

After the argument of the motion and pursuant to the suggestion made in open court respecting an attempt to be made to settle the Trustee's claims, I caused to be submitted an offer to the Trustee to pay the sum of $3,000 in settlement of the Trustee's claims against me. I was assured by friends and relatives that the said sum would be available.

As a result of negotiations between my attorneys and attorneys for the Trustee, I was advised that the offer was inadequate. I endeavored to raise the maximum amount available among all of my friends and relatives. As a result of my pleas and the efforts of my immediate family, I was assured that the maximum sum that could be raised on my behalf was the sum of $3,500, and accordingly I instructed my attorneys to submit an offer in said sum to the attorneys for the Trustee. This sum was to be paid in cash upon the acceptance of the offer of compromise and settlement.

[fol. 26] I have just been advised that this offer has been rejected and that no offer of compromise in any sum other than payment in full of the Trustee's claims will be accepted.

I have done the utmost within the means of myself, my family, and friends, to affect an adjustment of the Trustee's claims, without success.

In view of the state of my health, I again submit that before the motion is passed upon that this Court make its own independent investigation into my physical condition,

and I reiterate that I am perfectly willing to submit to a physical examination by any doctor employed by the Trustee or designated by this Court.

Joseph F. Maggio.

(Sworn to the 20th day of March, 1945.)

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

(B 80681)

Appearances:

Glass & Lynch, Esqs., Attorneys for Trustee in Bankruptcy; Emanuel Linhardt, Esq., of Counsel.

Duberstein & Schwartz, Esqs., Attorneys for Respondent, Joseph F. Maggio.

OPINION

[fol. 27] MANDELBAUM, D. J.:

This is a motion by the Trustee in Bankruptcy to punish the respondent, Joseph F. Maggio, for contempt for failure to comply with an order of the Referee, to turn over to the Trustee some $17,500 in photographic equipment belonging to the bankrupt estate, or the proceeds of the sale of said merchandise.

The turnover order has been affirmed by the District Court and the Circuit Court of Appeals of this Circuit.

The respondent, in his affidavits in opposition to this contempt motion, alleges that he did not have the assets in his possession at the time of the turnover order. However, the turnover order conclusively determines that when it is entered the respondent has possession of the assets, "and no evidence can properly be considered on a motion for commitment for contempt, except that which tends to show inability on the part of the bankrupt to comply with the order because of something which has taken place since the order was made." *In re Siegler*, C. C. A. 2nd, 31 F. [2d] 972.

Respondent has not sustained his burden of satisfactorily accounting for the disposition of the assets by his mere denial of possession under oath.

FINDINGS OF FACT

1. On August 9th, 1943, the Referee in Bankruptcy made an order requiring Joseph F. Maggio, to turn over and deliver to the Trustee in this proceeding, within 10 days of service of a certified copy of said order upon him, certain merchandise belonging to the bankrupt of the amount and value of $17,500 consisting of photographic equipment and supplies or the proceeds of the sale of said merchandise.

2. On August 16th, 1943, a certified copy of the turnover order was duly served upon Joseph F. Maggio.

[fol. 28] 3. On December 5th, 1944, the Referee's certificate of contempt was filed in this court.

4. The respondent, Joseph F. Maggio, has wholly failed to comply with said turnover order, and he has failed to explain to the satisfaction of this court his failure to comply.

CONCLUSIONS OF LAW

1. The respondent, Joseph F. Maggio is in contempt of court.

2. Respondent is to stand committed until he complies with the turnover order or until the further order of this court.

Motion granted. Settle order on notice.
Dated, April 18th, 1945.

Samuel Mandelbaum, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt

ORDER APPEALED FROM

A motion having been made herein by Raymond Zeitz, Trustee of the above-named bankrupt, to punish the respondent, Joseph F. Maggio, for contempt of court in having

disobeyed the lawful order of Hon. Oscar W. Ehrhorn, [fol. 29] Referee in Bankruptcy, dated August 9, 1943 directing the respondent to turn over to the Trustee herein certain merchandise belonging to the bankrupt estate of the amount and value of $17,500, consisting of photographic equipment and supplies, or the proceeds, of the sale of said merchandise as required by said order, and said motion having duly come on for hearing before this Court on the 10th day of April, 1945, and on reading and filing the order to show cause dated December 7, 1944, the petition of Raymond Zeitz, Trustee herein verified December 7, 1944, and the exhibits thereto annexed, the affidavit of Emanuel Linhardt sworn to February 19, 1945, and the reply affidavit of Emanuel Linhardt sworn to March 19, 1945, in support of said motion, and the affidavit of Joseph F. Maggio, sworn to March 16, 1945, and the further affidavit of Joseph F. Maggio, sworn to March 20, 1945, in opposition thereto, the turnover order of the said Referee dated August 9, 1943, the affidavit of Ben Bassin, sworn to August 24, 1944 of personal service of said turnover order upon the said Joseph F. Maggio, the order of Hon. Vincent L. Leibell, dated December 28, 1943, affirming in all respects the order of said Referee, the mandate of the United States Court of Appeals for the Second Circuit, dated November 13, 1944, affirming the said order of the District Court, the order on said mandate, dated November 28, 1944, and the certificate of Hon. Oscar W. Ehrhorn, Referee in Bankruptcy dated December 4, 1944, filed on December 5, 1944 and the opinion, Findings of Fact and Conclusions of Law of Hon. Samuel Mandelbaum dated April 18, 1945, and due deliberation having been had thereon, and after hearing Glass & Lynch, attorneys for the Trustee, by Emanuel Linhardt of counsel, in support of said motion and Duberstein & Schwartz, attorneys for the respondent Joseph F. Maggio, by Max Schwartz of counsel, in opposition thereto, and it appearing to the satisfaction of this Court that the respondent, Joseph F. Maggio, has failed and refused and still fails and [fol. 30] refuses to comply with the terms of said turnover order dated August 9, 1943.

Now, on motion of Glass & Lynch, attorneys for said Trustee, it is hereby

Ordered, Adjudged and Decreed, that the said motion be, and the same hereby is in all respects granted; and it is further

Ordered, Adjudged and Decreed, that the respondent, Joseph F. Maggio is guilty of a contempt of this Court in having wilfully prejudiced, impeded and impaired the rights of the Creditors and Trustee in Bankruptcy herein, in having wilfully and deliberately disobeyed said lawful order of said Referee in Bankruptcy and in neglecting and refusing as in said order directed, to turn over to said Trustee certain merchandise in the amount and value of $17,500, or the proceeds thereof, now in his possession and under his control; and it is further

Ordered, Adjudged and Decreed, that the respondent, Joseph F. Maggio, be forthwith committed to the Federal Detention Headquarters, 427 West Street, City, County and State of New York, to be there confined and detained for his contempt in failing to comply with the terms of the aforesaid order; and it is further

Ordered, Adjudged and Decreed, that the United States Marshal for the Southern District of New York, be, and hereby is ordered and directed to forthwith apprehend the above named respondent and detain him in the Federal Detention Headquarters, 427 West Street, City, County and State of New York until the above named respondent shall have purged himself of such contempt by complying with said turnover order, or until the further order of this Court; and it is further

[fol. 31] Ordered, Adjudged and Decreed, that in the alternative the respondent may purge himself of the aforesaid contempt by forthwith turning over to said Trustee the said merchandise in the amount and value of $17,500, or the proceeds thereof, belonging to his estate and found to be in his possession or under his control.

Dated: New York, N. Y., April 30, 1945.

Samuel Mandelbaum, U. S. D. J.

IN UNITED STATES DISTRICT COURT

[Title omitted]

NOTICE OF APPEAL

SIR:

Please take notice that Joseph F. Maggio, the respondent herein, hereby appeals to the United States Circuit Court of Appeals for the Second Circuit, from an order entered

June 5th, 1945, in the United States District Court for the Southern District of New York (Hon. Samuel Mandelbaum, D. J.), insofar as said order adjudges Joseph F. Maggio, [fol. 32] the respondent, guilty of contempt of Court, and directs that he be committed to the Federal Detention Headquarters, 427 West Street, City, County and State of New York, and be there confined and detained until he shall have purged himself of contempt and shall have complied with the turnover order dated August 9th, 1943, and that he may purge himself by turning over to Raymond Zeitz, Trustee, merchandise in the amount and value of $17,500, or the proceeds thereof.

Dated: Brooklyn, N. Y., June 11th, 1945.

Yours, etc., Duberstein & Schwartz, Attorneys for Joseph F. Maggio, Respondent, 26 Court Street, Brooklyn, New York.

To: Glass & Lynch, Esqs., Attorneys for Trustee, 170 Broadway, New York City.

[fol. 33] In United States Court of Appeals for the Second Circuit

Luma Camera Service, Inc., Bankrupt; Joseph F. Maggio, Appellant; Raymond Zeitz, Appellee

Stipulation Designating Contents of Record

It is hereby stipulated and agreed, by and between the attorneys for the respective parties, that the following constitutes the record on appeal herein:

1. Order to show cause, granted December 7th, 1944, and petition of Raymond Zeitz, as Trustee, in support thereof, verified December 7th, 1944.

(a) Exhibits annexed to petition, consisting of Exhibits A, B, C, D, E and F.

2. Affidavit of Emanuel Linhardt, sworn to February 19th, 1945.

3. Reply affidavit of Emanuel Linhardt, sworn to March 19th, 1945.

4. Affidavit in opposition of Joseph F. Maggio, sworn to February 16th, 1945, and exhibit annexed thereto.

[fol. 34] 5. Supplemental affidavit of Joseph F. Maggio, sworn to March 20th, 1945.

6. Opinion of Judge Samuel Mandelbaum, of April 18th, 1945.

7. Order of Judge Samuel Mandelbaum dated April 30th, 1945 and entered June 5th, 1945.

8. Notice of appeal, dated June 11th, 1945.

Dated: Brooklyn, New York, March 30, 1946.

Max Schwartz, Attorney for Appellant. Glass & Lynch, by Sidney Freiberg, Attorneys for Appellee.

[fol. 35] In United States District Court

[Title omitted]

Stipulation as to Record

It is hereby stipulated and agreed that the foregoing is a true and correct transcript of the record of the said District Court in the above entitled action, as agreed on by the parties.

Dated: New York, April , 1946.

Max Schwartz, as successor of Duberstein & Schwartz, Attorneys for Appellants. Glass & Lynch, Attorneys for Appellee.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, OCTOBER TERM, 1946

No. 31

(Argued October 11, 1946. Decided November 11, 1946)

Docket No. 20284

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt; JOSEPH F. MAGGIO, Appellant; RAYMOND ZEITZ, Trustee-Appellee

Before L. Hand, Swan and Frank, Circuit Judges

Appeal from an order of the United States District Court for the Southern District of New York, adjudging appellant in contempt. Affirmed.

[fol. 38] Max Schwartz, for appellant.

Glass & Lynch and Benjamin H. Wicksel (Leslie Kirsch and Sidney Freiberg, of counsel) for appellee.

On April 23, 1942, Luma Camera Service, Inc., a corporation engaged in the business of selling photographic equipment and supplies, was adjudicated a bankrupt on an involuntary petition. Appellant Maggio had been its president, director, stockholder, the principal active officer, and the manager of the bankrupt, and dominated and controlled it. On January 18, 1943, the trustee in bankruptcy, seeking a turnover order, filed a petition which alleged that in 1941 Maggio had taken a considerable amount of the company's merchandise and still had them in his possession. Hearings pursuant to this petition were held before the referee in April 1943. At these hearings, Maggio testified that he had never taken any merchandise or other assets of the bankrupt. On the basis of evidence, consisting largely of the bankrupt's books and accounts, the referee inferred, and on August 9, 1943, found, an unexplained shortage of merchandise with a value of $17,500 in November and December 1941. The referee also then found as a fact that Maggio had taken it in November and December 1941, and had fraudulently concealed it from the trustee. Although no evidence was offered that Maggio still pos-

sessed it on August 9, 1943, the referee further found as a fact that he then did. He entered an order on the same day, August 9, 1943, directing Maggio to turn over to the trustee such merchandise, "consisting of photographic equipment and supplies of the class and description commonly dealt in by the bankrupt."

[fol. 39] On petition to review, the district judge, by an order of December 28, 1943, affirmed the referee's order. See opinion in 57 F. Supp. 632. On appeal, this court affirmed without opinion; see 145 F. (2d) 241 (C. C. A. 2). Certiorari was denied; 324 U. S. 841.

On December 4, 1944, the referee, ex parte, certified that Maggio was in contempt for failure to comply with the turnover order. On petition of the trustee, the district court, on June 5, 1945, entered an order (dated April 30, 1945), adjudging Maggio guilty of contempt for wilfully and deliberately disobeying the order and committed him to jail, to be there confined and detained until he should have purged himself of the contempt by turning over to the trustee the merchandise valued at $17,500 (or the proceeds thereof) or until further order of the court.

In the turnover hearings in April 1943, the only evidence on the question of Maggio's ability to surrender the merchandise or its proceeds (other than Maggio's denial that he had never taken the merchandise) was his testimony that neither he nor members of his immediate family had any assets of value, and that, since the bankruptcy proceedings began, he had been working on defense jobs in a clerical capacity at a small salary. In connection with the proceedings to punish for contempt, the only additional evidence was Maggio's affidavit that he had continued to work until November 1944 for a salary of $170 a month and that the salary had been used for the support of his family which included two dependents, but that since that time he had not been employed because of bad health, having, for a short time, received small sick leave and insurance benefits. In that affidavit, Maggio said that, for some time before November 1944, he had been suffering from a serious heart condition which had culminated in series of heart [fol. 40] attacks in November 1944, so as to completely disable him, that he had been treated at least twice a week and sometimes oftener by a family physician, Dr. Benjamin F. Maggio, and that he would submit to physical examinations by any doctor employed by the trustee or designated

by the court. He also stated in the affidavit that, through friends and relatives he had been able to raise the sum of $3500 which he had offered to the trustee in settlement of all the trustee's claims against him; that this was the maximum amount he could thus raise; that he had no funds of his own available; but that the trustee had rejected his offer. To this affidavit was attached an affidavit by Dr. Maggio to the effect that the bankrupt had a serious heart complaint, that the slightest exertion would precipitate serious and dangerous heart attacks, and that the bankrupt's condition required a special and complicated regimen of diet and rest treatment and freedom from all anxiety over a long period of time. No physical examination of Maggio was made on behalf of the trustee or on the direction of the judge, nor was any hearing held to determine appellant's physical condition.

From the contempt order entered June 5, 1945, he appeals. He asks that the order be reversed and the proceedings remanded with directions that there be (1) a hearing as to his present ability to comply with the turnover order of August 9, 1943, and (2) an examination of his physical condition to determine whether imprisonment would be harmful to his health.

FRANK, Circuit Judge:

1. To obtain the turnover order, the trustee had the burden of proving, by "clear and convincing evidence,"[1] [fol. 41] these two facts: (a) That Maggio wrongfully took (*i. e.*, stole) the merchandise in November and December 1941, and (b) that he still possessed it, or its proceeds, when the referee entered that order one year and nine months later, in August 1943. With respect to the first, the trustee showed the shortage which occurred at the end of 1941; there was sufficient evidence to support the referee's finding as to that fact (*i. e.*, the finding was not "clearly erroneous"). The trustee offered no evidence to prove the second fact. To sustain his burden of showing, by "clear and convincing evidence," that Maggio still had possession, the trustee relied on the following reasoning: The shortage, having established the theft, at the end of 1941, also established Maggio's possession twenty-one months later; for

[1] *Oriel* v. *Russell*, 278 U. S. 358, 362.

the stealing raised a "presumption" that he then continued to retain the goods or their proceeds, and it was therefore up to Maggio to prove otherwise, which he did not do:

Were this a case of first impression involving the validity of a turnover order, we would not accept such reasoning. A "presumption"—an inference—that a state of facts once existing continues to exist is often sound, because in accord with common sense. But all the circumstances of a case like this render the inference here highly unreasonable, since it contradicts any common-sensible interpretation of ordinary human motivations. Indeed, accepting the referee's finding that Maggio took the merchandise in 1941, the only reasonable inference is that Maggio, needing money as obviously he did, promptly disposed of the cameras and camera equipment, and that he dissipated the cash proceeds long before the expiration of the twenty-one months when the turnover order was entered (and even long before the commencement of the turnover proceedings in April 1943, some eighteen months after the taking). In any other type of litigation, a court would reject a finding [fol. 42] based upon such an inference which flies in the face of the reasonably inferable facts. "The presumption of continued possession is only as strong as the nature of the circumstances permits. The presumption loses its force and effect as time intervenes and as circumstances indicate that the bankrupt is no longer in possession of the missing goods or their proceeds. Where the property is of the type which the bankrupt would likely dissipate such as money or saleable goods, the presumption is further weakened. Such presumption of continuing possession in bankruptcy cases is an application of a general and well recognized rule of the law of evidence. With reference to the effect of lapse of time upon this presumption, see 31 C. J. S., Evidence, §124, page 737, as follows: 'Always strongest in the beginning the inference steadily diminishes in force with lapse of time, at a rate proportionate to the quality of permanence belonging to the fact in question, until it ceases or perhaps is supplanted by a directly opposite inference.'"[2]

---

[2] *Brune* v. *Fraidin*, 149 F. (2d) 325, 327 (C. C. A. 4). See also *Liverpool & London & Globe Ins. Co.* v. *Nebraska Storage Warehouses*, 96 F. (2d) 30, 36 (C. C. A. 8).

Here, were we free to do so, we would say that, since of course Maggio no longer had possession, the trustee did not seek to have Maggio surrender goods or money he possessed, but sought, with the aid of a transparent fiction, to have the court, after a trial without a jury, punish him for a crime (*i. e.*, that of concealing assets or of a false oath in a bankruptcy proceeding)[3] with the hope that such punishment would induce Maggio's close relatives and friends to put up the money. We would refer to Judge Mack's comment on the impropriety of thus coercing such relatives and friends.[4] We would hold that a *turnover proceeding may* [fol. 43] *not, via a fiction, be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury.*[5] We would note, too, that one consequence of the fiction is that the respondent may be twice punished for the same offense, since, if he is later indicted for violation of 11 U. S. C. A. § 52 (b), his imprisonment for contempt will not serve as a defense. We would add that nowhere in the Bankruptcy Act has Congress even intimated an intention to authorize such results, and that they stem solely from a judge-made gloss on the statute.

As Judge L. Hand observed in *Robbins* v. *Gottbetter*, 134 F. (2d) 843, 844 (C. C. A. 2), the Supreme Court has never decided in favor of the fictitious "presumption" here invoked. On the contrary, it has often ruled that a fiction must never be used to work injustice, or "to obscure the facts when they become important," or when the fiction is "unrelated to reality."[6] True, the Supreme Court has several times denied certiorari as to our decisions which uti-

[3] See 11 U. S. C. A. § 52 (b) (1) and (2).

[4] *Freed* v. *Central Trust Co.*, 215 F. 873, 877 (C. C. A. 7).

[5] Cf. Sanborn, J., in *In re Rosser*, 101 F. 562, 566 (C. C. A. 8).

[6] *Curry* v. *McCanless*, 307 U. S. 357, 374; *Story, J.*, in *U. S.* v. *Nineteen Hundred and Sixty Bags of Coffee*, 8 Cranch 398, 415; *Holmes, J.*, in *Blackstone* v. *Miller*, 188 U. S. 189, 204; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 92; *Liverpool, etc. Ins. Co.* v. *Orleans Assessors*, 221 U. S. 346, 354.

See discussion of fictions and cases cited in *Hammond-Knowlton* v. *U. S.*, 121 F. (2d) 192, 199, 200 (C. C. A. 2).

lized this particular "presumption," and did so with respect to our decision on the previous appeal in the instant case. But we have been admonished frequently that denial of certiorari has no precedential significance.

However, the decisions in this circuit sanctioning this "presumption" fiction[7] constrained this court, on the pre- [fol. 44] vious appeal, to decide, without opinion, that the referee had correctly rested his finding on that "presumption," despite its glaring departure from what any reasonable person would believe were the actual facts.

With the turnover order once sustained, the contempt order necessarily followed. For, under *Oriel* v. *Russell*, 278 U. S. 358, the findings made in connection with the turnover order were res judicata in the contempt proceedings. That is to say, the judge, on June 5, 1945, had to accept it as true (1) that on August 9, 1943, Maggio still had possession of the merchandise taken in December 1941, or its proceeds, and also (2) that this possession continued until June 5, 1945 (*i. e.*, continued for four years and five months after the taking in 1941), unless Maggio showed that, since August 9, 1943, he had been deprived of that possession or had in some other way become unable to comply with the turnover order. As Maggio made no such showing of an intervening change of facts, there was no error in the entry of the contempt order.

2. It is, however, urged as error that the trial judge ignored Maggio's seriously impaired health. We think it clear that the judge did ignore it. (The trustee says in his brief that, on a motion by Maggio for stay of commitment, the trustee showed the court a medical report from which it appeared that Maggio was not gravely ill; since the record does not contain that report or indicate in any way that the district judge saw or considered it, we must, of course, disregard it, for ours is not a trial court.) We assume, arguendo, that if the proceedings had been in form what they were in fact, *i. e.*, a criminal action under 11

---

[7] See, *e. g.*, *In re Pinsky-Lapin Co.*, 98 F. (2d) 776 (C. C. A. 2); *Selinson* v. *Goldsmith*, 128 F. (2d) 977 (C. C. A. 2); *Robbins* v. *Gottbetter*, 134 F. (2d) 843 (C. C. A. 2); *Cohen* v. *Jeskowitz*, 144 F. (2d) 39 (C. C. A. 2); cf. *In the Matter of Union Fabrics, Inc.*, 153 F. (2d) 303 (C. C. A. 2); *Rosenblum* v. *Marinello*, 133 F. (2d) 674 C. C. A. 3).

U. S. C. A. 52(b), we would have had the authority to consider whether, in the light of Maggio's grave heart ailment, the trial judge abused his discretion in jailing Maggio.

But, even so, Maggio's malady is surely irrelevant—unless we do away with the fictitious foundation of these pro- [fol. 45] ceedings. For, assuming, as the fiction requires, that, at the time of his commitment, he had the ability to comply with the turnover order, he could easily have avoided the effect of imprisonment on his health by immediately surrendering the merchandise to the trustee or by promptly drawing a check for $17,500 to the trustee's order. On that assumption, the situation is precisely the same as if a man, who had been ordered by a court to execute a deed, sought, on a plea of ill-health, to avoid commitment for contempt for disobeying the order.

Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio "to do an impossibility, and then punish him for refusal to perform it."[8] Our own precedents keep up from abandoning that pretense which, in this case, may well lead to inhumane treatment of Maggio and which, in other turnover cases, has brought about a revival of those evils of the debtors' prison which legislation like the Bankruptcy Act was supposed to abolish. See, Douglas (now Mr. Justice Douglas), *Bankruptcy*, 2 Encyc. of Soc. Sc. (1930) 449.[9] It is an open secret that Maggio is being punished for a crime, but we are precluded from so acknowledging.

To eliminate the unfortunate results of the unreasonable fiction we have adopted, it will be necessary for the Supreme Court to grant certiorari and then to wipe out our more recent precedents. In this connection, it is well to note that the judges of this court have not been in accord concerning the wisdom of the fiction above discussed. In *Danish* v. *Sofranski*, 93 F. (2d) 424 (C. C. A. 2), this court, in an opinion by Judge Hand, all but abandoned the fiction. At the next term, however, in *In re Pinsky-Lapin & Co.*, 98 F. [fol. 46] (2d) 776 (L. Hand, A. N. Hand and Chase sitting), the Danish case was over-ruled; Judge L. Hand concurred

[8] Sanborn, *C. J.*, *in In re Rosser*, 101 F. 562, 566, 568.

[9] See also Radin, *Debt*, 5 Encyc. Soc. Sc. (1931) 32, 37-38.

in the result but with a criticism of the reasoning. In *Seligson* v. *Goldsmith*, 128 F. (2d) 977 (C. C. A. 2), this court (L. Hand, Swan and Frank), in an opinion by Judge L. Hand, reluctantly adhered to the ruling in *Pinsky-Lapin & Co., supra*. In *Robbins* v. *Gottbetter*, 134 F. (2d) 843 (C. C. A. 2; L. Hand, A. N. Hand and Frank sitting), the opinion by Judge L. Hand stated that he and the writer of the present opinion were highly critical of the fiction but acquiesced in the previous ruling. In *Cohen* v. *Jeskowitz*, 144 F. (2d) 39 (C. C. A. 2; A. N. Hand, Chase and Frank), the writer of the present opinion concurred but again expressed agreement with Judge L. Hand's views.[10] It should also be noted that a conflict between the Circuits now exists, since, in *Brune* v. *Fraidin*, 149 F. (2d) 325 (C. C. A. 4), the Fourth Circuit, in an excellent opinion by Judge Watkins,[11] has repudiated the "presumption" doctrine when carried to the extent required by our recent decisions, which decisions we feel obliged to follow in the instant case. [fol. 47] What we have said should make it plain that, under those decisions, the district judge was compelled to

---

[10] Since then, in two cases decided without opinion, we stuck to the fiction; see *Zeitz* v. *Maggio*, 145 F. (2d) 241 (C. C. A. 2; L. H., Swan and Clark); *In the Matter of Union Fabrics, Inc.*, 153 F. (2d) 303 (C. C. A. 2; Swan, Clark and Frank).

[11] The court said, (p. 329): "A turnover order is not a money judgment saying that the bankrupt ought to have the merchandise or its proceeds. It is the court's command that he surrender, and necessarily presupposes ability to comply. Obviously the court should not order one to do something that was impossible and then punish him for failure to do it. It has been said that such procedure dangerously approaches near the line, if it does not overstep it, of imprisonment for debt. If the bankrupt has concealed and then dissipated assets of the estate, punishment should be sought under the provisions of the bankrupt law relating to making of false oaths or concealment of assets. The bankruptcy courts are invested with power to require bankrupts to surrender their property and to enforce obedience by attachment for contempt, but a power so drastic should be exercised only in a plain case and always with due regard to the constitutional rights of the citizen."

give no heed to those human considerations [12] which doubtless would have influenced him had Maggio been, in form, as he was in fact, convicted of a crime. In other words, Maggio is worse off than if he had been criminally prosecuted.

Affirmed.

Swan, P. J., concurs in the result.

[fol. 48] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 14th day of November one thousand nine hundred and forty-six.

Present: Hon. Learned Hand, Hon. Thomas W. Swan, Hon. Jerome N. Frank, Circuit Judges.

In the Matter of LUMA CAMERA SERVICE, INC., Bankrupt; JOSEPH F. MAGGIO, Appellant; RAYMOND ZEITZ, Trustee-Appellee

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

Alexander M. Bell, Clerk.

---

[12] An intimation to the contrary, in *In re Siegler*, 31 F. (2d) 972, 974 (C. C. A. 2), must be taken as dictum, since there we reversed an order refusing to adjudge the bankrupt in contempt.

[fol. 49] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. In re Luma Camera Service, Inc. Joseph F. Maggio, Appellant; Raymond Zeitz, Appellee. (31). Judgment. United States Circuit Court of Appeals, Second Circuit. Filed November 11th, 1946. Alexander M. Bell, Clerk.

[fol. 50] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 51] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1946

No. 967

ORDER ALLOWING CERTIORARI—Filed March 10, 1947.

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on Cover: Enter Max Schwartz, File No. 51,831, U. S. Circuit Court of Appeals, Second Circuit, Term No. 967, Joseph F. Maggio, Petitioner, vs. Raymond Zeitz as Trustee in Bankruptcy of Luma Camera Service, Inc. Petition for a writ of certiorari and exhibit thereto. Filed January 31, 1947. Term No. 967 O. T. 1946.

FILE COPY

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 967.

JOSEPH F. MAGGIO,

Petitioner,

vs.

RAYMOND ZEITZ, AS TRUSTEE IN BANKRUPTCY OF LUMA CAMERA SERVICE, INC.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

MAX SCHWARTZ,
Counsel for Petitioner.

INDEX

Subject Index

Table of Cases Cited

STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 967

JOSEPH F. MAGGIO,

Petitioner,

vs.

RAYMOND ZEITZ, AS TRUSTEE IN BANKRUPTCY OF LUMA CAMERA SERVICE, INC.

PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petition of Joseph F. Maggio, respectfully prays for a writ of certiorari to the Circuit Court of Appeals for the Second Circuit, to review the decree of that Court, filed November 11th, 1946 (R. 45), affirming the order of the District Court of the United States for the Southern District of New York, dated the 30th day of April, 1945 (R. 28-31). The order of the District Court adjudged Joseph F. Maggio, the petitioner, to be guilty of contempt of Court and directed that he be imprisoned until he shall have purged himself by complying with the turnover order entered August 9th, 1943, directing Joseph F. Maggio to

turn over to the trustee, merchandise of the value of $17,500.00 or the proceeds thereof.

Opinions Below

The opinion of the Circuit Court of Appeals for the Second Circuit, appears in the record at pages 37-45, and is reported in 157 F. 2(d) 951.

The opinion of the District Court is found in the record at pages 27-28 and has not as yet been officially reported.

Jurisdiction

The decree of the Circuit Court of Appeals for the Second Circuit sought to be reviewed, was filed on November 11th, 1946 (R. 45).

The jurisdiction of this Court is invoked under Section 23(c) of the Bankduptcy Act, as amended by the Act of June 22nd, 1938, C. 575, Sec. 1, 52 Stat. 854, 11 U. S. C. A. Sec. 47(a), and Sec. 240(a) of the Judicial Code as amended by the Act of February 13th, 1925, Chapter 229, Sec. 1, 438 Stat. 938, 28 U. S. C. A. Sec. 347(a).

Summary Statement of Matters Involved

On April 23rd, 1942, Luma Camera Service, Inc., a corporation engaged in the business of selling photographic equipment and supplies, was adjudicated a bankrupt.

Joseph F. Maggio (hereinafter referred to as petitioner) had been its President, Director and Stockholder.

The bankrupt ceased to conduct business and executed a general assignment for the benefit of creditors on December 30th, 1941.

On January 18th, 1943, the trustee in bankruptcy, seeking a turnover order, filed a petition which alleged that in 1941, Maggio had taken a considerable amount of the company's merchandise and still had them in his possession.

Hearings pursuant to this petition were held before the Referee in May and June, 1943. At these hearings, Maggio testified he had never taken any merchandise or other assets of the bankrupt.

The trustee based his entire proceeding upon mathematical computations, particularly the inventory figure appearing in the books of the bankrupt as of January 1st, 1941, which said figure likewise appeared in a financial statement issued by the bankrupt as of December 31st, 1940 and signed by the petitioner. The trustee used this inventory figure as of January 1st, 1941, to wit, $30,889.95, knowing that the petitioner could only deny the correctness of this figure at the risk of admitting the issuance of a false financial statement and inviting a criminal proceeding against himself.

In this dilemma, the petitioner admitted the inventory figure as true and correct.

On the basis of evidence, consisting largely of the bankrupt's books and accounts, the Referee inferred and on August 9th, 1943, found an unexplained shortage of merchandise, with a value of $17,500.00.

The history of the inventory record as shown by the books and accounts of the bankrupt, was as follows:

1/1/36	$14,444.65	(Rec. 40)
1/1/37	14,997.24	(Rec. 42)
1/1/38	17,410.10	(Rec. 43)
1/1/39	18,880.09	(Rec. 43)
1/1/40	20,250.24	(Rec. 44)

In the light of these figures, it is obvious the bankrupt did not have an actual inventory on hand on January 1st, 1941 of $30,889.95.

There was no proof in the record as to what the actual physical inventory was on January 1st, 1941. The record is silent and no proof was offered as to when the merchan-

dise claimed to be unaccounted for, was last in the possession of the bankrupt or the petitioner or when it was removed and converted into cash.

Although no evidence was offered, the Referee found as a fact, that Maggio had taken the merchandise in November and December of 1941 and had failed to turn the same over to the trustee.

Although no evidence was offered that Maggio still possessed it on August 9th, 1943, the Referee further found as a fact, that he then did, and entered an order on the same day, August 9th, 1943, directing Maggio to turn over to the trustee, merchandise in the value of $17,500.00 or the proceeds of the sale thereof.

On petition to review, the District Court by an order of December 28th, 1943, affirmed the Referee's order. (See opinion in 57 F. Supp. 632.)

On appeal, the Circuit Court of Appeals affirmed the within opinion. See 145 F. 2(d) 241, (C. C. A. 2). Certiorari was denied. 324 U. S. 841.

On December 4th, 1944, the Referee ex parte certified that Maggio was in contempt for failure to comply with the turnover order.

The petitioner in answering and opposing affidavits, set forth facts with respect to his present inability to comply with the terms of the turnover order and also that since the entry of the turnover order, he had become afflicted with a physical disability, rendering him totally disabled and incapable of obtaining employment, by reason of which committment or imprisonment would be inimical to his health.

Without holding any hearing and on the petition of the trustee, the District Court on June 5th, 1945, entered an order (dated April 30th, 1945) adjudging the petitioner guilty of contempt for willfully and deliberately disobeying the turnover order, and committed the petitioner to jail

to be there confined and detained until he shall have purged himself of the contempt, by turning over to the trustee the merchandise valued at $17,500.00 or the proceeds thereof or until the further order of the Court.

In the turnover proceedings in May and June of 1943, the only evidence on the question of Maggio's ability to surrender the merchandise or its proceeds (other than his denial that he had never taken the merchandise), was the testimony of the petitioner that neither he nor members of his immediate family had any assets of value and that since the bankruptcy proceedings began, he had been working on defense jobs at a small salary.

In connection with the proceedings to punish for contempt, the opposing affidavits of the petitioner, set forth facts that the petitioner had continued to work until November 1944 for a salary of $170.00 per month and that this salary has been used for the support of his family, which included two dependents and that after November 1944, he had not been employed because of bad health and had received for a short time small sick leave and insurance benefits.

In the opposing affidavits (R. 19-21, 25-26), the petitioner said that for some time before November 1944, he had been suffering from a serious heart condition, which culminated in a series of heart attacks in November of 1944, so as to completely disable him. That he had been treated at least twice a week and sometimes oftener by a family physician and that he would submit to physical examinations by any doctor employed by the trustee or designated by the Court. To this affidavit was attached an affidavit of Dr. Maggio, to the effect that the bankrupt had a serious heart complaint.

Subsequently, as appears from the medical report attached to a motion for a stay on contempt from the order

of the District Court, the petitioner was found by the physicians of the Prudential Insurance Company, to be totally disabled and his claim for disability was recognized by the insurance company and the petitioner still continues and is presently receiving disability benefits.

No physicial examinations of the petitioner were made on behalf of the trustee or at the direction of the Judge, nor was any hearing held to determine the petitioner's physical condition or his present inability to comply.

From the contempt order entered June 5th, 1944, the petitioner appealed to the Circuit Court of Appeals from the Second Circuit which rendered its decision (R. 37-45), affirming the order of the District Court.

Questions Presented

Is not the punishment imposed by the Court repugnant to the Fifth Amendment of the Constitution of the United States which forbids deprivation of life, liberty and property without due process of law and to the Eighth Amendment of the Constitution of the United States which forbids cruel and unusual punishment?

Did the Court below err in failing to conduct a trial or hearing as to the present ability of the appellant to comply with and obey the order of the Court and as to whether imprisonment would be inimical to the life of the appellant?

May a contempt order, via a fiction founded on the presumption of continued possession, for failure to comply with a turnover order founded upon the same fiction, "presumption of continued possession," be substituted for a criminal prosecution so as to deprive a man of his basic constitutional right—the right of trial by jury?

Specification of Errors

The Circuit Court of Appeals erred:

1. In holding that an order adjudging the appellant in contempt might be founded upon the fiction of "presumption of continued possession," for the alleged failure of the appellant to comply with a turnover, which in turn was likewise based upon the very same fiction, where in fact, from the situation of the case, the inference of the presumption is not only unreasonable, but the Court itself is of the opinion that the appellant has not the ability to comply with the order and is being directed to do an impossibility and then to punish him for refusing to perform it.

2. In failing to give heed to the humane situation present in this case, to wit, the seriously impaired health of the appellant, which the Court found was clearly ignored by the District Court and which, if the proceedings had been in form what they are in fact, a criminal action under XI U. S. C. A. 52(b), the Court would have had the authority to consider and would have adjudged that the District Court abused its discretion in jailing the appellant in the light of his grave heart ailment.

Reasons Relied On for the Allowance of the Writ

The Circuit Court of Appeals in its opinion, clearly indicates that were this a case of first impression, it would have reversed the order under appeal and would not have accepted the reasoning upon which the same is founded.

The present contempt order was based upon the presumption of continued possession of the very same assets directed to be turned over by the original turnover order entered August 9th, 1943. This turnover order in turn, was likewise based upon the presumption of continued posses-

sion of assets, supposedly in the possession of the appellant in November and December of 1941.

Under the circumstances, the Circuit Court of Appeals was of the opinion that, (1) the invocation of the presumpton was highly unreasonable, contradicting any common, sensible interpretation of the facts and human motivations, and further, (2) the presumption of continued possession loses its force and effect as time intervenes and as the circumstances indicate, that the petitioner is no longer in possession of the missing goods or proceeds.

Here in fact, the trustee did not seek to have the petitioner surrender the goods or monies actually in his possession, but sought with the aid of fiction to have the Court punish him for a crime.

Nowhere in the Bankruptcy Act has Congress even intimated any intention to authorize the institution of turnover and contempt proceedings founded on the fiction of the presumption of continued possession, as the substitution for a criminal prosecution so as to deprive a man of his basic constitutional right—the right of trial by jury.

The Supreme Court has never decided in favor of the fictitious "presumption" invoked herein.

Here the order on appeal is based solely upon the presumption, despite its glaring departure from what any reasonable person would believe were the actual facts.

The Circuit Court of Appeals also erred in ignoring the seriously impaired health of the appellant, which the Court clearly admits was ignored by the District Court and which it would have taken into consideration had the proceedings been never what they are in fact, a criminal action under XI U. S. C. A. 52(b), in which event the Court would have had authority to consider whether in the light of the petitioner's grave heart ailment, the trial judge abused his discretion in jailing the petitioner.

It should be noted that a conflict between the Circuits now exists upon the questions involved herein, since in *Bruno* v. *Fraidin*, 149 F. 2(d) 325, (C. C. A. 4), the Fourth Circuit has repudiated the "presumption" doctrine.

The questions involved herein have arisen quite frequently in recent years in the various Circuits, with diverse results, and dissatisfaction has been expressed by the Courts as to the state of the law. The questions involved are vital in the administration of the Bankruptcy Act.

As the Supreme Court has never decided in favor of the fictitious "presumption" herein invoked and by reason of the conflict of decisions between the Circuits and in view of the nature of the decision of the Circuit Court of Appeals herein, it is respectfully urged that the questions involved should be settled by this Court.

ARGUMENT

POINT A

There is a conflict of decisions between the Circuits upon the sanctioning of the "presumption" fiction of the granting of contempt and turnover orders.

In *Brune* v. *Fraidin*, 149 F. (2d), (C. C. A. 4), the Fourth Circuit repudiated the presumption doctrine when carried to the extent required by the decisions in the Second Circuit, which decisions, however, the Second Circuit feels obliged to follow until the Supreme Court expresses its views upon the subject.

However, in the Second Circuit, fiction of presumption of continued possession was not invoked and was held not applicable in *In re Schoenberg*, (C. C. A. 2) 70 F. 2(d), 321 and in *In re West Produce Corporation*, (C. C. A. 2) 118 F. 2(d) 274, 277.

Apparently following, or in accord with the views of *Brune* v. *Fraidin*, 149 F. 2(d) 325, (C. C. A. 4), and contra to the views of the Circuit Court of Appeals for the Second Circuit, are the views expressed in *Price* v. *Kosmin*, 149 F. 2(d) 102, (C. C. A. 3); *In re Zappala*, (D. C. Pa.), 44 F. Supp. 353; *In re Satzberg*, (D. C. Pa.), 42 F. Supp. 282; *In re Peril* (D. C. Pa.), 31 F. Supp. 28; *Marin* v. *Ellis*, (C. C. A. 8), 15 F. 2 (d) 321; *In re J. L. Marks*, 85 F. 2(d) 392, (C. C. A. 7); *Samel* v. *Dodd*, (C. C. A. 5), 142 F. 68, 73; *Kirsner* v. *Taliaferro et al.*, (C. C. A. 4), 202 F. 51.

By reason of the conflict of decisions in the various Circuits and from the nature of the decision of the Circuit Court of Appeals for the Second Circuit herein, it is respectfully urged that this Court assume jurisdiction, grant the writ sought and determine the questions raised.

Point B

The order of the District Court, adjudging the petitioner, Maggio, in contempt, affirmed by the Circuit Court of Appeals, violates the Fifth and Eighth Amendments of the Constitution of the United States, in that the order deprives him of life or liberty without due process of law and said order imposes a cruel and unusual punishment upon the petitioner.

Althought urged both before the District Court and the Circuit Court of Appeals that the seriously impaired health of Maggio, the petitioner, should be taken into consideration, the Circuit Court of Appeals found,

(1) that the District Judge did ignore this issue;

(2) but that, if the proceedings were in form what they are in fact, a criminal action, it would have had to consider, in the light of Maggio's grave heart ailment, whether the trial judge abused his discretion in jailing Maggio;

(3) that although the Court knew Maggio could not comply with the turnover order, it must keep a straight face and pretend that he could and thus affirm the order which directs Maggio to do an impossibility and then punish him for refusal to perform it only by reason of the fact that the precedents of the Court keep it from abandoning the pretense which will lead to inhuman treatment of Maggio.

Clearly what is being done here to Maggio constitutes inhuman treatment and he is being meted out cruel and unusual punishment, as defined and within the decisions of *Weems* v. *United States*, 217 U. S. 349, 368; *United States ex rel. Brown* v. *Lederer*, (C. C. A. 7), 140 F. 2(d) 136, cert. den. 322 U. S. 734; *Wilkerson* v. *Utah*, 99 U. S. 130, 135; *In re Kemmler*, 136 U. S. 436, 446-7.

The District Court, without holding any trial, found and adjudged Maggio, the petitioner, to be in contempt of Court and directed that he be jailed. This punishment is so arbitrary as to deny him due process of law. The power of the Court to punish for contempt, should be used with caution and deliberation. *Redman* v. *United States*, (C. C. A. 9), 77 F. 2(d) 126, 127.

This Court, in *In re Michael*, — U. S. —, 66 S. Ct. 78, reiterated this principle, in interpreting various acts passed by Congress curtailing the range of conduct which Courts can punish for contempt.

Petitioner, Maggio, was entitled to a trial upon both the issue as to his present ability to comply with the turnover order, as well as the issue as to whether imprisonment would be inimical to his health before being found in contempt. *Oriel* v. *Russell*, 278 U. S. 358; *United States* v. *Jaeger*, (C. C. A. 2) 117 F. 2(d) 483, 488; *In re Sobel*, (C. C. A. 2) 242 F. 487; *In re Stavrahn* (C. C. A. 2) 174 F. 330; *In re Nevin*, 278 F. 601, 606-7; and *Cooke* v. *United States*, 267 U. S. 517, 537.

Furthermore, there should be some limitation in point of time for the institution of any contempt proceeding and as the contempt proceeding is based on a presumption which the Circuit Court of Appeals has found to be contrary to fact and one arising more than five years ago, the present proceeding should be deemed barred by reason of lapse of time and the dissipation of the presumption. *Prendergast*, 217 U. S. 412, 63 S. Ct. 268; and *In re Barton Brothers*, 149 F. 620 (D. C. Ark.).

Certainly a respondent in a Civil proceeding should not be subjected to greater punishment than would be meted out in a Criminal proceeding and this is what is precisely taking place herein, resulting in cruel and inhuman punishment being inflicted upon the petitioner, Maggio.

POINT C

A contempt proceeding via a fiction founded on the presumption of continued possession, entered for failure to comply with a turnover order founded upon the same conviction, may not be substituted for a criminal prosecution and the entry of such an order under such circumstances, is improper and should be vacated.

Neither a turnover order nor a contempt order should issue where it appears from the evidence that there is no reasonable probability of the continued possession or control of the missing property or its proceeds by the bankrupt, for it would be a futile thing to pass a turnover order which is primarily a contempt proceeding, when the latter could not properly result in imprisonment for failure of the bankrupt to comply. *In re Fraidin*, (D. C. Md.) 55 F. Supp. 129, Aff'd. *Brune* v. *Fraidin*, 149 F. 2(d) 325, (C. C. A. 4).

Where the Court is not sufficiently satisfied of the factual ability to make compliance, no contempt order should issue.

In re Rosser, (C. C. A. 8) 101 F. 562, 566, 568; and *Sheehan* v. *Hunter*, (C. C. A. 8) 133 F. 2(d) 303.

The Court should not enter a contempt order unless satisfied that the bankrupt, herein the petitioner, has the present ability to comply. *Kirsner* v. *Taliaferro*, (C. C. A. 4) 202 F. 51, 60-61; *In re Goldman*, 62 F. 2(d) 424, (C. C. A. 1); *Samel* v. *Dodd*, (C. C. A. 5) 142 F. 68, 73; *Stuart* v. *Reynolds*, 204 F. 709; *American Trust Co.* v. *Wallis*, 126 F. 464.

Oriel v. *Russell*, 278 U. S. 358, never decided in favor of the fictitious presumption herein invoked; *Robbins* v. *Gottbetter*, (C. C. A. 2) 134 F. 2(d) 843, 844. Here the contempt order was entered solely by reason of the decisions in the Second Circuit sanctioning the presumption fiction which constrained the Circuit Court on the previous appeal on the turnover order to decide without opinion, that the Referee had correctly rested his finding on the presumption, despite the finding of the Court, however, that the finding was a glaring departure from what any reasonable person would believe were the actual facts.

As the Circuit Court states, it knows the petitioner, Maggio, cannot comply with the order, but must pretend that he can and must thus affirm orders which first direct Maggio to do an impossibility and then punish him for refusal to perform it. The Circuit Court felt it was compelled to affirm the contempt order, solely by reason of the fact that its own precedents kept it from abandoning the pretense, which in this case it concedes, will lead to inhuman treatment of the petitioner, Maggio.

The history of this fiction in the Second Circuit Court of Appeals shows that the judges of that court have been divided with respect to it, and that that court has not maintained consistent rulings. In *Danish* v. *Sofranski*, 93 F. 2(d) 424, the court, consisting of Judges Manton, L. Hand and Swan, in an opinion by Judge L. Hand, virtually abandoned the fiction. At the next term, the Court now consist-

ing of Judges L. Hand, A. N. Hand and Chase, overruled Judge L. Hand's decision in the *Danish* case. See *In re Pinsky-Lapin Co.*, 93 F. 2(d) 777; Judge L. Hand concurred in an opinion criticizing the reasoning of the majority. In *Seligson* v. *Goldsmith*, 128 F. 2(d) 977, the Court, consisting of Judges L. Hand, Swan and Frank, in an opinion by Judge L. Hand, reluctantly adhered to the ruling in the *Pinsky-Lapin* case, obviously only because he and Judge Frank thought it undesirable to have the doctrine shift with each change in the composition of the Court. In *Robbins* v. *Gottbettor*, 134 F. 2(d) 843, the Court, consisting of Judges L. Hand, A. N. Hand and Frank, in an opinion by Judge L. Hand, stated that he and Judge Frank were highly critical of the fiction but acquiesced in the court's precedents. See also concurring opinion of Judge Frank in *Cohen* v. *Jeskowitz*, 144 F. 2(d) 39. The opinion in the instant case makes it clear that Judges L. Hand and Frank, if they had not felt obliged to adhere to the previous rulings, would have repudiated the fiction.

In the language of the Circuit Court of Appeals, "to eliminate the unfortunate results of the unreasonable fiction, we have adopted, it will be necessary for the Supreme Court to grant certiorari and then to wipe out our more recent precedents." In the circumstances of this case, the petitioner, Maggio, is worse off than if he had been criminally prosecuted.

This Court has said that a fiction must never be used to work injustice, or "to obscure the facts when they become important," or "when the fiction is unrelated to reality." *Curry* v. *McCanless*, 307 U. S. 357, 374; Story, N. in *U. S.* v. *Nineteen Hundred and Sixty Bags of Coffee*, 8 Cranch 398, 415; Holmes, J., in *Blackstone* v. *Miller*, 188 U. S. 189, 204; *Helvering* v. *Stockholms Enskilda Bank*, 293 U. S. 84, 92; *Liverpool, etc. Ins. Co.* v. *Orleans Assessors*, 221

U. S. 345, 354. See also the discussion of fictions, and cases cited, in *Hammond-Knowlton* v. *U. S.*, 121 F. 2(d) 192, 199, 200 (C. C. A. 2).

Conclusion

It is therefore respectfully submitted that this case, by reason of the questions involved, the conflict of opinions in the various Circuits, the opinion of the Circuit Court of Appeals for the Second Circuit, is one calling for the exercise by this Court of its supervisory powers, in order that important questions in the administration of bankruptcy proceedings may be settled.

These questions should be finally determined by this Court and a definite determination made with respect to the application of the fiction of presumption of continued possession in turnover and contempt proceedings.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Second Judicial Circuit, sitting at New York, N. Y., commanding said Court to certify to and to send up to this Court on a day to be designated, a full and complete transcript of the record and of all proceedings by the Circuit Court of Appeals had in this case, to the end that this cause may be reviewed and determined by this Honorable Court; that the order and decree of the Circuit Court of Appeals for the Second Judicial Circuit be reversed and that your petitioner be granted such other and further relief as may seem proper in the premises.

JOSEPH F. MAGGIO,
By MAX SCHWARTZ, ESQ.,
Counsel for Petitioner.

MAX SCHWARTZ, ESQ.,
Of Counsel.

FILE COPY

Office - Supreme Court, U. S.
FILED
SEP 6 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM, 1947

No. 38

JOSEPH F. MAGGIO,

Petitioner,

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA SERVICE, INC.

APPELLANT'S BRIEF.

MAX SCHWARTZ,
Counsel for Petitioner.

ALPERT PRESS, BROOKLYN, N. Y., TEL. TRIANGLE 5-1058-1059

INDEX.

Subject Matter.

Table of Cases Cited.

Other Authorities Cited.

Supreme Court of the United States

OCTOBER TERM, 1947

No. 38

JOSEPH F. MAGGIO,

Petitioner,

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA SERVICE, INC.

APPELLANT'S BRIEF.

This brief is submitted as a supplement to the petition for certiorari granted March 10th, 1947 (67 S. Ct. 970).

It is intended to supplement Point C of the argument as set forth in the petition for certiorari.

ARGUMENT.

POINT C.

Supplementing the matter set forth in Point C of the argument in the petition for certiorari, we respectfully call the Court's attention to the following:

In *Oriel* v. *Russell*, 278 U. S. 358, the last decision by this Court on this subject, the Court said at pages 362-363:

> "We think a proceeding for a turnover order in bankruptcy, is one the right to which should be supported by clear and convincing evidence. * * * A mere preponderance of evidence in such a case is not enough. The proceeding is one in which coercive methods by imprisonment are probable and are foreshadowed."

The Court adopted the views in *Toplitz* v. *Walser*, (C. C. A. 3), 27 F. (2d) 196, *Epstein* v. *Steinfeld*, (C. C. A. 3), 210 F. 236, and expressed itself as being in accord with the language in the case of *In re Epstein*, (D. C. Pa.), 206 F. 568. Likewise it indicated that where there is any reasonable doubt of the ability of the bankrupt to comply with the turnover order, the Courts have hesitated to issue orders of commitment.

In the Third Circuit, the turnover order is considered an adjudication of possession of merchandise as of the date of the filing of the petition in bankruptcy, whereas in the Second Circuit, the turnover order is deemed an adjudication of possession of merchandise in the respondent as of the date of such order.

In *Epstein* v. *Steinfeld*, the Court also quoted Judge McPherson's decision in *In re Epstein*, 206 F. 568, quoted at length by the Court in *Oriel* v. *Russell*, as follows:

> "* * * The point of time to which the inquiry is directed is the date of bankruptcy, and the precise question is whether the bankrupt was then in possession or control of money or of goods * * *. Being fundamental, this question needs to be examined first of all, but it neither involves the bankrupt's present ability to turn over, nor raises the question whether he should be punished for contempt * * *. The two questions last referred to, therefore, do not need consideration at the first stage of the investigation * * *."

After thus quoting Judge McPherson, the Court then continued:

> "* * * The second stage is to determine whether or not the property required is still in the possession or control of the bankrupt, and then he is physically able to deliver it to his trustee. The correct practice at this stage of the proceedings has been authoritatively stated by Judge Gray in American Trust Co. v. Wallis, 126 F. 464, 61 C. C. A. 342, in the following language:

> "'* * * If it shall appear that he is not physically able, to deliver the property required by the order, then confessedly, proceedings for contempt, by fine of imprisonment, would result in nothing, certainly not in a compliance with the order. The contempt in this case can only be purged by a reiteration of the physical impossibility to comply with the order whose disobedience is being thus punished. An order made under such circumstances would be as absurd as it is inconsistent with the principles of individual liberty.'"

In the recent decision of this Court in *United States* v. *United Mine Workers of America*, 67 S. Ct. 677, the Court by Mr. Chief Justice Vinson, at page 701, said:

> "But where the purpose is to make the defendant comply, the court's discretion is otherwise exercised. It must then consider the character and magnitude of the harm threatened by continued contumacy, and the probable effectiveness of any suggested sanction, in bringing about the result desired.
>
> "It is a corollary of the above principles that a court which has returned a conviction for contempt must, in fixing the amount of a fine to be imposed as a punishment or as a means of securing future compliance, consider the amount of defendant's financial resources and the consequent seriousness of the burden to that particular defendant."

In a dissenting opinion, Mr. Justice Black (concurred in part by Mr. Justice Douglas), said at page 715:

> "At a very early date this Court declared and recently it has reiterated, that in contempt proceedings courts should never exercise more than 'the least possible power adequate to the end proposed.' Anderson v. Dunn, 6 Wheat. 204, 231, 5 L. Ed. 242; In re Michael, 326 U. S. 224, 227, 66 S. Ct. 78.

"* * * Whatever constitutional safeguards are required in a summary contempt proceeding, whether it be for criminal punishment, or for the imposition of coercive sanction, we must be ever mindful of the danger of permitting punishment by contempt to be imposed for conduct which is identical with an offense defined and made punishable by Statute. In re Michael, 326 U. S. 224, 66 S. Ct. 78, 79."

Mr. Justice Rutledge, in his dissenting opinion, said at pages 737-738:

"* * * The law has fixed standards for each remedy, and they are neither identical nor congealable. They are, for damages in civil contempt, the amount of injury proven and no more, Gompers v. Buck's Stove & R. Co., supra, 221 U. S. at page 444, 31 S. Ct. at page 499, 55 L. Ed. 797, 34 L. R. A., N. S., 874; for coercion, what may be required to bring obedience and not more, whether by way of imprisonment or fine; for punishment, what is not cruel and unusual or, in the case of a fine, excessive within the Eighth Amendment's prohibition. * * *

"The Government concedes that the Eighth Amendment's limitation applies to penalties in criminal contempt; and that in civil contempt the damages awarded cannot exceed the proven amount of injury. It also concedes, as I understand, that purely coercive relief can be no greater than is necessary to secure obedience. * * *"

In the light of the decision of this Court and the opinions of the dissenting Justices, it is time to eliminate the unfortunate results of the unreasonable fiction invoked by the lower Courts in the instant proceeding. It is time that an end be put to a fiction which is working an injustice, obscuring the facts and is entirely unrelated to reality.

In *Penfield Co. of California* v. *Securities & Exchange Commission*, 67 S. Ct. 918, Mr. Justice Rutledge, in a concurring opinion, at page 924, said:

> "The character of the proceedings as a whole, whether as Civil or Criminal must be co-related with the character of the penalty imposed, * * *."

In a dissenting opinion (concurred in in part by Mr. Justice Jackson) Mr. Justice Frankfurter, at page 930, said:

> "If a District Court believes howsoever relative a demand for documents may have been at the time it was made, circumstances had rendered the subpoena obsolete, it is entitled to consider the merits of the subpoena as of the time that its enforcement is sought and not as of the time it was issued. We particularly ought not to reverse the action of the District Judge on the abstract assumption that papers ordered to be produced as relative to an inquiry at the time the subpoena issued, continued relevant several months later."

This principle enunciated by Mr. Justice Frankfurter, is likewise urged here, that the merits of the motion to punish for contempt and ability to comply, should be considered as of the time the enforcement is sought, to wit, the time of the making of the motion for punishment for contempt and not as of the time the turnover order was issued.

Just as Mr. Justice Frankfurter stated, that the Court ought not to rely on an abstract assumption, so too here should the Court not rely upon any "abstract presumption."

In the recent issue of the "University of Pennsylvania Law Review", Volume 95, pages 789-791, this very case was written up in a case note, and in discussing the application of the presumption of continued possession states (at p. 791):

> "Use of the presumption, however should be tempered with judicial discretion.[16] Essentially it is a presumption of fact,[17] no stronger than the circumstances warrant,[18] and hence it becomes an 'unreasonable fiction' only when applied in contradiction of the facts. Since the circumstances in the instant case apparently warranted the court's expressed conviction that appellant was no longer able to comply with the turnover order,[19] the difficulty of the court was not that the presumption had to be applied because of the precedent, but that it must be applied conclusively in defiance of the facts. It is doubtful that the Supreme Court should approve this interpretation of its rule in the Oriel Case."

In the light of the foregoing, it is respectfully submitted with a proper interpretation of the facts in this case and the decision of *Oriel* v. *Russell*, 278 U. S. 358, that a presumption of continued possession, is not applicable herein.

---

[16] Brune v. Fraidin, 149 F. 2d 325 (C. C. A. 4th 1945) (power to commit for contempt should be exercised carefully); In re Nevin, 278 Fed. 601 (C. C. A. 6th 1922) (bankrupt committed should not be confined indefinitely).

[17] 2 Wigmore, Evidence § 382 (3d ed. 1940); 9 id. § 2530; McGovern, supra note 5, at 333.

[18] In re Pinsky-Lapin & Co., 98 F. 2d 776 (C. C A. 2d 1938); Brune v. Fraidin, 149 F. 2d 325 (C. C. A. 4th 1945); Marin v. Ellis, 15 F. 2d 321 (C. C. A. 8th 1926); 2 Collier Bankruptcy 524-525 (turnover proceedings); 1 id. at 246-247 (contempt proceedings).

CONCLUSION.

It is respectfully submitted that the proper interpretation of the facts, the sections of the Bankruptcy Act and the cases in question, require an order granting the petitioner's application and adjudging that presumption of continued possession is not applicable herein and that the order adjudging the petitioner in contempt be vacated and set aside.

It is respectfully submitted that the order of the Circuit Court should be reversed with a direction to reverse the order of the District Court and that an order be entered denying the application of Raymond Zeitz, as trustee, to punish the petitioner as and for a contempt.

Respectfully submitted,

JOSEPH F. MAGGIO
By MAX SCHWARTZ, ESQ.,
Counsel for Petitioner.

MAX SCHWARTZ, ESQ.,
Of Counsel.

FILE COPY

Supreme Court of the United States

October Term—1946.

No. 967

JOSEPH F. MAGGIO,

Petitioner,

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA SERVICE, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOSEPH GLASS,
Attorney for Respondents.

LESLIE KIRSCH,
SIDNEY FREIBERG,
Of Counsel.

INDEX

PAGE

Table of Cases Cited

Supreme Court of the United States

October Term—1946.

No. 967

JOSEPH F. MAGGIO,

Petitioner,

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA SERVICE, INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Nature of Order

This case involves an order, dated April 30, 1945, adjudging petitioner Maggio in contempt of court in having wilfully disobeyed a turnover order dated August 9, 1943 (84-92).[1] On November 11, 1946 the United States Circuit Court of Appeals for the Second Circuit unanimously affirmed said contempt order *sub nomine In re Luma Camera Service, Inc.* (37 at p. 37), with opinion appearing at pages 37-45 of the record and reported in 157 F. 2d 951.

The turnover order, the certificate of contempt, and the contempt order severally state that petitioner has now in his possession or under his control certain merchandise of the bankrupt of the cost value of $17,500, or the proceeds thereof (22-27; 42-45; 84-85).

---

1 All references are to the folios of the record.

The petition to punish for contempt and the reply affidavit state the facts as to petitioner's wilful failure to turn over said property to the trustee in bankruptcy (10-18; 67-72).

Petitioner's affidavit in opposition to the motion to punish for contempt and his petition to this Court[2] merely rehash certain issues involved in making the *antecedent* turnover order (59, 80). Petitioner did not show that since August 9, 1943, he had been deprived of possession of the property or had become unable to comply with the turnover order (44 at p. 42). He merely repeated his old story that he did not have the property in his possession at the time of the turnover order (59, 39 at p. 38).

The sole question in this case is whether the contempt order—*not the antecedent turnover order*—was properly made. The fundamental flaw in petitioner's argument lies in his failure to realize that this case does *not* involve the validity of the turnover order.

Prior Proceedings and Opinions

The time lapse between the making of the turnover order on August 9, 1943, its affirmance on November 13, 1944, the denial by this Court of certiorari on February 5, 1945, and the entry of the contempt order on June 5, 1945, was due solely to petitioner's assiduous exploitation of the possibilities of delay in his attempt to avoid compliance with the said turnover order. The turnover order was confirmed by the District Court on December 28, 1943. *In re Luma Camera Service, Inc.*, 57 F. Supp. 632. On November 13, 1944 it was affirmed by the Circuit Court of Appeals. *Zeitz* v. *Maggio*, 145 F. 2d (C. C. A. 2d), 241. On February 5, 1945,

---

2 Pages 3 and 4 of the Petition.

this Court denied certiorari. *Maggio* v. *Zeitz*, 364 U. S. 841. On June 5, 1945 the contempt order was entered. On November 11, 1946, it was affirmed by the Circuit Court of Appeals. *In re Luma Camera Service, Inc.*, 157 F. 2d (C. C. A. 2d) 951.

In affirming the said contempt order the Circuit Court of Appeals held (44 at p. 42; 157 F. 2d 951 at p. 954):

> *"With the turnover order once sustained, the contempt order necessarily followed. For, under Oriel* v. *Russell*, 278 U. S. 358, *the findings made in connection with the turnover order were res judicata in the contempt proceedings."*

Statement of the Case

Respondent controverts as erroneous petitioner's "Summary Statement of Matters Involved". It is merely a rehash of contentions made many times below, in the District Court, the Circuit Court of Appeals and in this Court concerning the validity of the *turnover* order. That is not *this* case. This case concerns the validity of the contempt order. The facts set forth under the heading "Nature of Order" at pages 1 and 2, *supra*, constitute a concise and correct statement of this case.

For a complete and accurate statement of the facts concerning the other—the prior concluded case in respect of the turnover order—this Court is respectfully referred to the opinion of the District Court in *In re Luma Camera Service, Inc.*, 57 F. Supp. 632, affirmed without opinion, *Zeitz* v. *Maggio*, 145 F. 2d (C. C. A. 2d) 241.

---

3 Italics in this and subsequent quotations are ours, unless otherwise indicated.

Argument

I. The petition presents no question of law worthy of review by this Court whose decision in the *Oriel* case clearly and completely determines this case.

II. The contempt order was made upon due notice to petitioner and only after ample opportunity had been given him to be heard in the proceedings culminating in the said order.

III. The interests of justice require that there be no further delay in enforcement of the contempt order.

POINT I

The petition presents no question of law worthy of review by this Court whose decision in the *Oriel* case clearly and completely determines this case.

The threshold proceedings in respect of the turnover order and whatever questions may have been involved therein are no longer here. *Oriel* v. *Russell*, 278 U. S. 356, is determinative on that point. In that case, in contrast to this, the petitioner had not had the benefit of a review on appeal of the validity of the turnover order. Nevertheless, this Court held (p. 363):

> "* * * Being made, it should be given weight in the future proceedings as one *that may not be collaterally attacked by an effort to try over the issue already heard and decided at the turnover.*"

The turnover order having been made, this Court further held (p. 363):

> "• • • Thereafter on the motion for commitment the *only* evidence that can be considered is the evidence of something that has happened since the turnover order was made, showing that *since* that time there has *newly* arisen an inability on the part of the bankrupt to comply with the turnover order."

Petitioner in his brief in the Circuit Court of Appeals conceded "that the turnover order of August 9th, 1943 may not be collaterally attacked". He did not attempt to give any evidence of a present inability to comply with the turnover order, caused by a factual situation which had developed since its entry.

In this respect the Circuit Court of Appeals in affirming the contempt order herein held (44 at p. 42):

> *"As Maggio made no such showing of an intervening change of facts, there was no error in the entry of the contempt order."*

Petitioner merely alleged in his affidavit in opposition to the motion to punish for contempt that he did not have the property in his possession at the time of the turnover order (59, 80)—an issue decided against him by the turnover order—and that he has been suffering from a purported "heart complaint" since 1941 (61, 64-66). Petitioner's contention that he did not have the property in his possession at the time of the turnover order was also made in his petition for a writ of certiorari to review the turnover order which was denied by this Court. *Maggio* v. *Zeitz*, 364 U. S. 841.

The present petition is in its entirety merely another attack upon the turnover order in terms which, as appears from the petition, were rejected in the antecedent original proceedings and appeals. The present petition is—except for fragmentary excerpts from the opinion of the court below—a carbon copy of the prior petition to this Court for certiorari to review the turnover order which this Court denied. *Maggio* v. *Zeitz*, 364 U. S. 841.

Points A and C of the present petition are fashioned after Points A and B of the prior petition. None of the cases cited in Points A and C of the present petition is in point for this case does *not* involve the validity of the turnover order.

This Court on May 6, 1946, in a similar case, *Jeskowitz* v. *Carter*, Supreme Court, Law ed., Advance Opinions, Vol. 90, No. 14,914, denied certiorari to review an order adjudging Jeskowitz in contempt of court in having wilfully disobeyed a turnover order. There, Jeskowitz likewise denied that he "has possession or control of the property in question".[4] Prior thereto and on December 11, 1944, this Court had denied certiorari, *Jeskowitz* v. *Carter*, 323 U. S. 787, to review a turnover order dated February 23, 1943, although, in a concurring opinion affirming the turnover order one of the judges of the Circuit Court of Appeals had expressed the hope that this Court might grant certiorari to consider the presumption of continuance of possession. *Cohen* v. *Jeskowitz*, 144 F. 2d (C. C. A. 2d) 39, 40.

The contempt order in this case was affirmed by the Circuit Court of Appeals on the principles laid down by this Court in the *Oriel* case. It is submitted that no question of law worthy of review by this Court exists in this case.

---

4 Folio 102 of the record in that case.

POINT II

The contempt order was made upon due notice to petitioner and only after ample opportunity had been given him to be heard in the proceedings culminating in the said order.

There is no merit in petitioner's contention in Point B of his petition that the contempt order violates the Fifth and Eighth Amendments of the Constitution. The record establishes that petitioner received due notice of all proceedings resulting in the contempt order (19-51, 85-87).

Ample opportunity was given him to be heard in those proceedings. No one prevented him from showing therein present inability to comply with the turnover order caused by a factual situation which had developed since the entry of the turnover order. Instead of availing himself of that opportunity, petitioner sought only to show that he did not have the property in his possession at the time of the turnover order and to rehash the questions of law and fact involved in the *antecedent* original proceedings and appeals before the referee, the District Court, the Circuit Court of Appeals and this Court.

The District Court read, studied and considered petitioner's affidavits in opposition to the motion to punish him for contempt as well as the brief of his attorney (84-88). The matter came on for final hearing April 10, 1945 (85). The matter was argued by counsel (87). The District Court rendered an opinion and made findings of fact and conclusions of law (78-83).

Petitioner submitted *no* probative evidence tending to show he is suffering from a "heart complaint". It is significant that the medical report referred to by petitioner at page 5 of the petition herein flatly contradicts petitioner's

assertion that he is suffering from a "heart complaint". That report is dated May 10, 1945 and states in part:

> "In 1941 the patient [petitioner] began to have attacks of substernal pressure lasting 10 to 15 minutes. * * *
>
> * * * * *
>
> "CONCLUSIONS AND RECOMMENDATIONS:
>
> "The most obvious abnormality in Mr. Maggio's case is cholelithiasis, and most of his symptoms may be due to this cause. *There is no evidence in our examinations that he has objective signs of coronary artery disease. His electrocardiograms, both regular and after exercise, are normal,* as is his sedimentation index. His blood count is not markedly abnormal * * *."

The Circuit Court of Appeals in respect of petitioner's purported illness held (45 at p. 43):

> "But, even so, Maggio's [petitioner's] malady is surely irrelevant— * * * he could easily have avoided the effect of imprisonment on his health by immediately surrendering the merchandise to the trustee * * *. (The) situation is precisely the same as if a man, who had been ordered by a court to execute a deed, sought, on a plea of ill-health, to avoid commitment for contempt for disobeying the order."

There is no merit in petitioner's statement that the contempt proceedings are barred by lapse of time. Only one year and four months elapsed between the making of the turnover order and the service of the petition to punish for contempt. In the interim petitioner had appealed to the District Court, to the Circuit Court of Appeals and had

petitioned this Court for certiorari to review the turnover order. If delay there was, it was caused solely by petitioner's exploitation of the possibilities thereof by unmeritorious appeals and applications.

Petitioner has wilfully disobeyed the turnover order. He has proffered no proof establishing present inability to comply therewith, caused by a factual situation which has developed since the entry of said order. His own papers conclusively prove that he never suffered from a "heart complaint". There was nothing to be tried that could properly have been tried unless the turnover proceedings were to be reopened.

POINT III

The interest of justice requires that there be no further delay in enforcement of the contempt order.

Petitioner's alleged reasons for granting certiorari are a confused inversion of the principles of the *Oriel* case and other applicable cases including

In re Roxy Liquor Corporation, 107 F. 2d (C. C. A. 7th) 533;

In re Williams Supply Co., Inc., 77 F. 2d (C. C. A. 2d) 909;

In re Oriel, 23 F. 2d (C. C. A. 2d) 409, affirmed *sub nomine Oriel v. Russell*, 278 U. S. 358;

The attempt to compel petitioner to comply with the turnover order has thus far been thwarted at every turn. The turnover order was made August 9, 1943. It was confirmed by the District Court December 28, 1943. It was affirmed by the Circuit Court of Appeals November 13,

1944. Certiorari was denied by this Court February 5, 1945.

The certificate of contempt was dated December 4, 1944 (42-45). The motion to punish for contempt was returnable December 13, 1944 (6) and was finally decided April 18, 1945 (83). The order granting that motion is dated April 30, 1945 (91). That order was stayed pending the hearing and determination of petitioner's appeal therefrom. On November 11, 1946 the Circuit Court of Appeals unanimously affirmed that order (37 at p. 37). Petitioner now counters with a petition to this Court for certiorari to review that order of affirmance. All proceedings under the contempt order pending the hearing and determination of this application have been stayed.

The practical effect of petitioner's argument is that, having thus far thwarted the trustee in bankruptcy by exploitation of every technicality to avoid compliance with the turnover order, he should now be given another opportunity to repeat his old story that he never was able, and, therefore, is not now able to comply with the turnover order (59). On that appellant is precluded. *In re Luma Camera Service, Inc.*, pages 37-45, record, 157 F. 2d (C. C. A. 2d) 951; *In re Arctic Leather Garment Co., Inc.*, 106 F. 2d (C. C. A. 2d) 99, 100; *In re Steinreich Associates Inc.*, 83 F. 2d (C. C. A. 2d) 254, 255.

In *In re Arctic Leather Garment Co., Inc.*, 106 F. 2d (C. C. A. 2d) 99, it was held (p. 100):

> "* * * The appellant was given full opportunity to be heard. But he merely repeated the old story, that no such property had ever existed, and on that issue the turnover order was of course a binding adjudication against him. *Oriel* v. *Russell, supra.*"

The interests of justice require that the order punishing petitioner for contempt be not thwarted again.

CONCLUSION

The petition for a writ of certiorari should be denied.

Dated: New York, N. Y.
February 24, 1947.

Respectfully submitted,

JOSEPH GLASS,
Attorney for Respondents.

LESLIE KIRSCH,
SIDNEY FREIBERG,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1947

No. 38

JOSEPH F. MAGGIO,

Petitioner,

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA SERVICE, INC.,

Respondent.

RESPONDENT'S BRIEF

JOSEPH GLASS,
Attorney for Respondent.

LESLIE KIRSCH,
SIDNEY FREIBERG,
Of Counsel.

INDEX

Table of Cases Cited:

Supreme Court of the United States

OCTOBER TERM, 1947

No. 38

JOSEPH F. MAGGIO,

Petitioner,

—against—

RAYMOND ZEITZ, as Trustee in Bankruptcy of LUMA CAMERA SERVICE, INC.,

Respondent.

RESPONDENT'S BRIEF

Preliminary Statement

On March 10, 1947 this Court (67 S. Ct. 970) granted certiorari to review the unanimous affirmance by the United States Circuit Court of Appeals for the Second Circuit on November 11, 1946 (45)[1] of an order of the District Court for the Southern District of New York dated April 30, 1945 (19-21) adjudging petitioner in contempt of Court in having wilfully disobeyed a turnover order dated August 9, 1943 (5-6).

The nature of the order under review, the prior proceedings and opinions in this case and the statement of the case appear at pages 1, 2 and 3 of respondent's brief in opposition to certiorari (No. 967, Oct. 1946 Term) to which this Court is respectfully referred.

1 All references are to the pages of the record.

The opinion of the Circuit Court of Appeals appears at pages 37-45 of the record and is reported in 157 F. 2d 951, *sub nomine In re Luma Camera Service, Inc.* The opinion of the District Court, not yet officially reported, appears at pages 18 and 19 of the record.

Argument

I. The order adjudging petitioner in contempt was properly made.

II. The entry of the order adjudging petitioner in contempt of court did not deny him due process.

Conclusion

The order adjudging petitioner in contempt of court should be affirmed.

POINT I

The order adjudging petitioner in contempt was properly made.

The sole issue here is whether the contempt order—not the antecedent *turnover* order—was properly made.

The Circuit Court of Appeals held, and it is conceded by petitioner, that the findings made in connection with the already adjudicated and affirmed turnover order were *res judicata* in the contempt proceedings (42, 157 F. 2d 951, 954). Judge Frank's opinion, in which Judge Swan did not join (45), confined itself solely to a *collateral* attack upon the "presumption of continued possession" applied in the already adjudicated and affirmed turnover proceedings (40).

That question is no longer here. Petitioner's contentions concerning presumption upon presumption are fallacious. The turnover order is an adjudication of petitioner's possession *in praesenti* (5; 6). The turnover order having been affirmed, there can no longer be argument about any legal presumption upon which it may have been based, any more than an affirmed judgment upon a verdict of a jury can be subjected to an exploration of the validity of every inference of fact involved in the verdict upon which the judgment was made and thereafter affirmed.

Oriel v. *Russell*, 278 U. S. 358, 365;
Farmers & Mechanics National Bank v. *Wilkinson*, 266 U. S. 503, 506;
In re Roxy Liquor Corporation, 107 F. 2d (C. C. A. 7th) 533, 535;
In re Kasimov, 81 F. 2d (C. C. A. 6th) 531;
In re Siegler, 31 F. 2d (C. C. A. 2d) 972, 973; and
Toplitz v. *Walser*, 27 F. 2d (C. C. A. 3d) 196.

Petitioner in effect argues that the trustee in bankruptcy has the burden of proving possession at the time when the contempt order is made. Such an argument stands the applicable rule on its head. After the turnover order has been made, the burden of proving present inability to comply therewith, caused by a factual situation which has developed since the entry of the turnover order, is upon the party against whom the turnover order is directed.

Oriel v. *Russell*, *supra*, at p. 363;
In re Roxy Liquor Corporation, *supra*;
In re Kasimov, *supra*;
In re Siegler, *supra*; and
Toplitz v. *Walser*, *supra*.

Petitioner failed to sustain that burden and so the lower Court held (42).

There is *no* conflict among the Circuits on the application of the governing principles of the *Oriel* case in proceedings to punish thieving bankrupts for contempt for failure to comply with turnover orders. *Brune* v. *Fraidin*, 149 F. 2d (C. C. A. 4th) 325, does not in any way support petitioner's erroneous contention in this respect. That case involved an appeal from a turnover order in the first instance. The court's discussion centered solely about the issue of whether the trustee was entitled to a turnover order under the existing circumstances. So, too, with all remaining cases cited by petitioner.

No case cited by petitioner supports his erroneous conception of the issue presented on this appeal. The lower court recognized that the validity of the contempt order could not be again challenged by petitioner on the same grounds on which he attacked the turnover order, and which were rejected by the Circuit Court of Appeals and by this Court, for it held (42; 157 F. 2d 951 at p. 954):

> *"With[2] the turnover order once sustained, the contempt order necessarily followed. For, under Oriel* v. *Russell*, 278 U. S. 358 *the findings made in connection with the turnover order were res judicata in the contempt proceedings."*

Accordingly, petitioner's contentions in points A and C of his petition and brief are fallacious.

The question sought to be raised by petitioner is not new to this Court. The same question arose in *Prela* v. *Hubshman*[3] namely, whether the bankrupt still remained in pos-

---

2 Italics in this and subsequent quotations are ours unless otherwise indicated.

3 The companion case to *Oriel* v. *Russell*, *supra* decided therewith in one opinion.

session of the assets he was shown to have withheld from his trustee. It was raised in connection with the turnover order in this very case which was affirmed by the Circuit Court of Appeals on November 13, 1944. *Zeitz* v. *Maggio*, 145 F. 2d (C. C. A. 2d) 241. This Court, however, denied certiorari. *Maggio* v. *Zeitz*, 324 U. S. 841. That question was raised in *Cohen* v. *Jeskowitz*, 144 F. 2d (C. C. A. 2d) 39, 40, where Judge Frank expressed the hope that this Court might grant certiorari to consider the presumption of continued possession in turnover proceedings. This Court, however, denied certiorari on December 11, 1944. *Jeskowitz* v. *Carter*, 323 U. S. 787. This Court likewise denied certiorari on May 6, 1946 in that case to review an order adjudging Jeskowitz in contempt of court in having wilfully disobeyed the turnover order although Jeskowitz made the same contentions as petitioner here. *Jeskowitz* v. *Carter*, 66 S. Ct. 1015.

There is no merit in petitioner's contention in respect of the lapse of time between the original taking, the making of the turnover order and the entry of the order adjudging him in contempt. The interval between the making of the turnover order on August 9, 1943, its confirmation on December 28, 1943, its affirmance by the Circuit Court of Appeals on November 13, 1944, the denial by this Court of certiorari on February 5, 1945, and the entry of the contempt order on June 5, 1945 was due solely to petitioner's assiduous exploitation of the possibilities of delay in his attempt to avoid compliance with the turnover order. Petitioner moved to stay all proceedings under the contempt order pending the hearing and determination of his appeal therefrom (*cf.* petition for writ, pp. 5, 6).

Less than two years elapsed between the original taking and the making of the turnover order. The corresponding

period in *Jeskowitz* v. *Carter*, 323 U. S. 787, in which certiorari was denied was *forty-one* months.

In *Prela* v. *Hubshman, supra,* the turnover order was made about twenty months after the date of the petition in bankruptcy. The commitment order was made about fourteen months after the date of the turnover order. Nevertheless all the Justices of this Court, of which those zealous guardians of civil rights, Justices Holmes, Brandeis and Stone were members, unanimously concurred in the opinion of Chief Justice Taft affirming the commitment order in that case.

It is respectfully submitted that the contempt order was properly made. It should be affirmed on the principles laid down by this Court in the *Oriel* case.

POINT II

The entry of the order adjudging petitioner in contempt of court did not deny him due process.

The turnover order was made August 9, 1943. The order adjudging petitioner in contempt was made April 30, 1945. Petitioner has flouted both since—and is still at liberty.

The record establishes that petitioner received due notice of all proceedings culminating in the contempt order (3-12; 19, 20). Ample opportunity was given him to be heard in those proceedings (17-20). No one prevented him from showing present inability to comply with the turnover order caused by a factual situation which had developed since the entry of the turnover order. Petitioner, instead of availing himself of that opportunity, merely repeated his denial of the original taking (an issue decided against him at the turnover) and sought to rehash the questions of law and fact involved in the antecedent original proceedings

and appeals before the Referee, the District Court, the Circuit Court of Appeals and this Court.

Petitioner's allegation concerning his heart condition which purportedly began in 1941 (15)—two years prior to the date the turnover order was made—is disproved by the same medical report to which he himself refers at pages 5 and 6 of his petition for writ of certiorari. That report is dated May 10, 1945 and states in part:

> "In 1941 the patient [petitioner] began to have attacks of substernal pressure lasting 10 to 15 minutes. * * *
>
> * * * * * *
>
> "CONCLUSIONS AND RECOMMENDATIONS:
>
> "* * * *There is no evidence in our examinations that he* [petitioner] *has objective signs of coronary artery disease. His electrocardiograms, both regular and after exercise, are normal,* as is his sedimentation index. His blood count is not markedly abnormal * * *."

In any event petitioner's purported illness was irrelevant and so the Circuit Court of Appeals held in affirming the order under review (43).

Petitioner's contention that his constitutional rights have been impaired and that he has been denied due process is fallacious and evidences a misconception of the nature of the proceedings culminating in the turnover order and in the order adjudging him in contempt of court.

A turnover order is civil and its enforcement does not violate the basic constitutional right to trial by jury.

> *Oriel* v. *Russell, supra;*
> *Hirschfield* v. *Bryant*, 14 F. 2d (C. C. A. 8th) 931 (turnover proceedings);
> *Kattelman* v. *Madden*, 88 F. 2d (C. C. A. 8th) 858 (contempt proceedings).

This Court held in *Farmers & Mechanics Nat. Bank* v. *Wilkinson*, 266 U. S. 503, 507, that the power of the District Court to punish for contempt for refusal to obey a turnover order, after affirmance by the Circuit Court of Appeals of an order affirming the turnover order and after denial by this Court of a petition for writ of certiorari to review the affirmance of the turnover order, could not be challenged for lack of jurisdiction or *denial of constitutional rights.*

This Court held in *Mueller* v. *Nugent*, 184 U. S. 1, that a commitment order directing imprisonment for failure to comply with a turnover order is *not* imprisonment for debt, stating (p. 13):

> "Nor was the commitment imprisonment for debt, as also contended. The order to pay over the money was not an order for the payment of a debt, but an order for the surrender of assets of the bankrupt placed *in custodia legis* by the adjudication."

This Court held in *Oriel* v. *Russell*, 278 U. S. 358 (p. 363):

> "* * * a motion to commit the bankrupt for failure to obey an order of the court to turn over to the receiver in bankruptcy the property of the bankrupt is a *civil contempt and is to be treated as a mere step in the proceedings to administer the assets of the bankrupt* as provided by law, and in aid of the seizure of those assets, and their proper distribution."

This Court, in *Penfield Co.* v. *Securities & Exch. Com.*, Supreme Court, Law ed., Ad. Op., Vol. 91, No. 11, 833, held (pp. 836, 837):

---

4 Italics Court's.

"Where a fine or imprisonment imposed on the contemnor is 'intended to be remedial by coercing the defendant to do what he had refused to do,' Gompers v. Bucks Stove & Range Co. supra (221 US p. 442, 55 L ed 806, 31 S Ct 492, 34 LRANS 874), the remedy is one for civil contempt. United States v. United Mine Workers, 330 US p—. ante, 595, 67 S Ct 677. Then 'the punishment is wholly remedial, serves only the purposes of the complainant, and is not intended as a deterrent to offenses against the public,' McCrone v. United States, 307 US 61, 64, 83 L ed 1108, 1110, 59 S Ct 685. One who is fined, unless by a day certain he produces the books, has it in his power to avoid any penalty. *And those who are imprisoned until they obey the order, 'carry the keys of their prison in their own pockets.'.* Re Nevitt (C. C. A. 8th) 117 F 448, 461. *Fine and imprisonment are then employed not to vindicate the public interest but as coercive sanctions to compel the contemnor to do what the law made it his duty to do.*"

This Court, in *United States v. United Mine Workers of America*, Supreme Court, Law. ed., Ad. Op., Vol. 91, No. 9, 595, held (p. 620):

"Judicial sanctions in civil contempt proceedings may, in a proper case, be employed for either or both of two purposes: to coerce the defendant into compliance with the court's order, and to compensate the complainant for losses sustained."

Mr. Justice Black and Mr. Justice Douglas in an opinion concurring in part, and dissenting in part, said (p. 633):

"And we agree that in such civil contempt proceedings, to compel obedience, *it was not necessary for the court to abide by all the procedural safeguards which surround trials for crime.*"

The burden of proving present inability to comply with the turnover order caused by a factual situation which has developed since the entry of the turnover order is upon petitioner.

Oriel v. *Russell*, 278 U. S. 358, 363;
In re Roxy Liquor Corporation, 107 F. 2d (C. C. A. 7th) 533, 535;
In re Siegler, 31 F. 2d (C. C. A. 2d) 972, 973;
Toplitz v. *Walser*, 27 F. 2d (C. C. A. 3d) 196.

Petitioner failed to sustain that burden. The Circuit Court of Appeals so held (42; 157 F. 2d 951 at p. 954):

"*As Maggio* [petitioner] *made no such showing of an intervening change of facts*, there was *no* error in the entry of the contempt order."

In each of the following cases the Circuit Court of Appeals affirmed orders granting trustees' motions to punish the bankrupts for contempt solely upon affidavits.

In re Stavrahn, 174 F. (C. C. A. 2d) 330, cert. den., 216 U. S. 631;
In re Oriel, 23 F. 2d (C. C. A. 2d) 409, affirmed by this Court *sub nomine Oriel* v. *Russell*, 278 U. S. 358; and
In re Weber Co., 200 F. (C. C. A. 2d) 404.

In *In re Roxy Liquor Corporation*, 107 F. 2d (C. C. A. 7th) 533, the Circuit Court of Appeals affirmed an order denying a petition for temporary release from custody under a commitment for contempt in failing to comply with a turnover order. The court held (pp. 535, 536):

> "The District Court was not required to grant a hearing upon a petition which informed the court that the hearing would be useless. There was no error in striking and dismissing the petition."

The motion to punish petitioner for contempt was returnable December 13, 1944 (1, 2). The decision granting that motion was not made until April 18, 1945 (19). Several hearings were held in Chambers of the District Judge before the contempt order was finally made (*cf.* petitioner's supplemental affidavit at p. 17 of the record). The matter came on for final hearing on April 10, 1945 (19, 20). The District Judge rendered an opinion and made findings of fact and conclusions of law (18-21).

The hearings terminating in the turnover order were detailed and protracted. Every conceivable opportunity to be heard and make explanations was accorded petitioner (*cf.* voluminous record submitted to this Court upon petitioner's first application for writ of ceritorari, *Maggio* v. *Zeitz*, 324 U. S. 841).

Petitioner willfully disobeyed the turnover order. The entry of the turnover order necessarily presupposed an ability on his part to comply therewith. His denial in the contempt proceedings of the already adjudicated and affirmed fact of the original taking did not tender any issue. He proffered no proof establishing present inability to comply with the turnover order caused by a factual situation

which had developed since its entry. His purported illness is an event which arose prior to the making of the turnover order. There was nothing to be tried that could properly have been tried unless the turnover proceedings were to be reopened. It follows that the entry of the contempt order did not result in a denial to him of due process of law.

This Court in the *Oriel* case, *supra*, approved the remarks of Judge McPherson in the case of *Re Epstein*, 206 F. 568 (278 U. S. 358 at pp. 365, 366):

> "'In the case in hand, the consequence is that, as the order to pay or deliver stands without sufficient reply, it remains what it has been from the first—an order presumed to be right, and therefore an order that ought to be enforced. * * *, and the bankrupt may therefore be subjected to the usual pressure that follows willful disobedience of a lawful command, namely, the inconvenience of being restrained of his liberty. No doubt this may be unpleasant; it is intended to be unpleasant; *but I see no reason why the proceeding should be condemned, as if it interfered with the liberty of the citizen without sufficient reason or excuse.* * * * imprisonment to compel obedience to a lawful judicial order (if it appear that obedience is being willfully refused) has not yet ceased and ought not to cease, unless it should be thought expedient to destroy all respect for the courts by stripping them of power to enforce their lawful decrees.'"

CONCLUSION

The order adjudging petitioner in contempt of court should be affirmed.

Dated, New York, N. Y.,
September 19, 1947.

Respectfully submitted,

JOSEPH GLASS,
Attorney for Respondent.

LESLIE KIRSCH,
SIDNEY FREIBERG,
Of Counsel.

pp. 14 - 18
Black J. - 3, 4.

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1947.

Joseph F. Maggio, Petitioner, v. Raymond Zeitz, as Trustee in Bankruptcy of Luma Camera Service, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 9, 1948.]

Mr. Justice Jackson delivered the opinion of the Court.

Joseph Maggio, the petitioner, was president and manager of Luma Camera Service, Inc., which was adjudged bankrupt on April 23, 1942. In January of 1943 the trustee asked the court to direct Maggio to turn over a considerable amount of merchandise alleged to have been taken from the bankrupt concern in 1941, and still in Maggio's possession or control. After hearing, the referee found that "the trustee established by clear and convincing evidence that the merchandise hereinafter described, belonging to the estate of the bankrupt, was knowingly and fraudulently concealed by the respondent [Maggio] from the trustee herein and that said merchandise is now in the possession or under the control of the respondent." A turnover order issued and was affirmed by the District Court and then unanimously affirmed by the Circuit Court of Appeals, Second Circuit, without opinion other than citation of its own prior cases. *Zeitz* v. *Maggio*, 145 F. 2d 241. Petition for certiorari was denied by this Court. 324 U. S. 841.

As Maggio failed to turn over the property or its proceeds, the Referee found him in contempt. After hearing, the District Court affirmed and ordered Maggio to be jailed until he complied or until further order of the

court. Again the Circuit Court of Appeals affirmed. 157 F. 2d 951.

But in affirming the Court said: "Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must thus affirm orders which first direct Maggio 'to do an impossibility and then punish him for refusal to perform it.'" Whether this is to be read literally as its deliberate judgment of the law of the case or is something of a decoy intended to attract our attention to the problem, the declaration is one which this Court, in view of its supervisory power over courts of bankruptcy, cannot ignore. Fraudulent bankruptcies probably present more difficulties to the courts in the Second Circuit than they do elsewhere. These conditions are reflected in conflicting views within the Court of Appeals, which we need not detail as they are already set out in the books: *In re Schoenberg*, 70 F. 2d 321; *Danish* v. *Sofranski*, 93 F. 2d 424; *In re Pinsky-Lapin & Co.*, 98 F. 2d 776; *Seligson* v. *Goldsmith*, 128 F. 2d 977; *Rosenblum v. Marinello*, 133 F. 2d 674; *Robbins* v. *Gottbetter*, 134 F. 2d 843; *Cohen* v. *Jeskowitz*, 144 F. 2d 39; *Zeitz* v. *Maggio*, 145 F. 2d 241.

The problem is illustrated by this case. The court below says that in the turnover proceedings it was sufficiently established that, towards the end of 1941, a shortage occurred in this bankrupt's stock of merchandise. It seems also to regard it as proved that Maggio personally took possession of the corporation's vanishing assets. But this abstraction by Maggio occurred several months before bankruptcy and over a year before the turnover order was applied for. The only evidence that the goods then were in the possession or control of Maggio was the proof of his one time possession supplemented by a "presumption" that, in the absence of a credible explanation by Maggio of his disposition of the goods, he continues in possession of them or their proceeds. Because the Court

of Appeals felt constrained by its opinions to adhere to this "presumption" or "fiction" it affirmed the turnover order. Now it says it is convinced that in reality Maggio did not retain the goods or their proceeds up to the time of the turnover proceedings and that the turnover order was unjust. But it considers the turnover order *res judicata* and the injustice beyond reach on review of the contempt order.

The proceeding which leads to commitment consists of two separate stages which easily become out-of-joint because the defense to the second often in substance is an effort to relitigate, perhaps before another judge, the issue supposed to have been settled in the first, and because while the burden of proof rests on the trustee, frequently evidence of the facts is entirely in possession of his adversary, the bankrupt, who is advantaged by nondisclosure. Because these separate but interdependent turnover and contempt procedures are important to successful bankruptcy administration, we restate some of the principles applicable to each, conscious however of the risk that we may do more to stir new than to settle old controversies.

I.

The turnover procedure is one not expressly created or regulated by the Bankruptcy Act. It is a judicial innovation by which the court seeks efficiently and expeditiously to accomplish ends prescribed by the statute, which, however, left the means largely to judicial ingenuity.

The courts of bankruptcy are invested "with such jurisdiction in law and equity as will enable them" to "cause the estates of bankrupts to be collected, reduced to money and distributed and determine controversies in relation thereto . . . ." Title 11 U. S. C. 11 (a) (7) and the function to "collect and reduce to money the property of the estate" is also laid upon the trustee. 11 U. S. C.

75 (a) (1). A correlative duty is imposed upon the bankrupt fully and effectually to turn over all of his property and interests, and in case of a corporation the duty rests upon its officers, directors or stockholders. 11 U. S. C. 25.

To compel these persons to discharge their duty, the statute imposes criminal sanctions. It denounces a comprehensive list of frauds, concealments, falsifications, mutilation of records and other acts that would defeat or obstruct collection of the assets of the estate, and prescribes heavy penalties of fine or imprisonment or both. 11 U. S. C. 52 (b). It also confers on the courts power to arraign, try and punish persons for violations, but "in accordance with the laws of procedure" regulating trials of crimes. 11 U. S. C. 11 (a) (4). And it specifically provides for jury trial of offenses against the bankruptcy Act. 11 U. S. C. 42 (c). Special provisions are also made to induce vigilance in prosecuting such offenses. It is the duty of the referee and trustee to report any probable grounds for believing such an offense has been committed to the United States Attorney, who thereupon is required to investigate and report to the referee. In a proper case he is directed to present the matter to the grand jury without delay, and if he thinks it not a proper case he must report the facts to the Attorney General and abide his instructions. 11 U. S. C. 52 (e).

Courts of bankruptcy have no authority to compensate for any neglect or lack of zeal in applying these prescribed criminal sanctions by perversion of civil remedies to ends of punishment, as some judges of the Court of Appeals suggest is being done.

Unfortunately, criminal prosecutions do not recover concealed treasure. And the trustee, as well as the Court, is commanded to collect the property. The Act vests title to all property of the bankrupt, including any transferred in fraud of creditors, in the trustee, as of the date

of filing the petition in bankruptcy. 11 U. S. C. 110, which puts him in position to pursue all plenary or summary remedies to obtain possession.

To entertain the petitions of the trustee the bankruptcy court not only is vested with "jurisdiction of all controversies at law and in equity" between trustees and adverse claimants concerning property acquired or claimed by the trustee, 11 U. S. C. 46, but it also is given a wide discretionary jurisdiction to accomplish the ends of the Act, or in the words of the statute to "make such orders, issue such process and enter such judgments, in addition to those specifically provided for, as may be necessary for the enforcement of the provisions of this title." 11 U. S. C. 11 (a) (15).

In applying these grants of power, courts of bankruptcy have fashioned the summary turnover procedure as one necessary to accomplish their function of administration. It enables the court summarily to retrieve concealed and diverted assets or secreted books of account the withholding of which, pending the outcome of plenary suits, would intolerably obstruct and delay administration. When supported by "clear and convincing evidence," the turnover order has been sustained as an appropriate and necessary step in enforcing the Bankruptcy Act. *Oriel* v. *Russell*, 278 U. S. 358; *Cooper* v. *Dasher*, 290 U. S. 106. See also *Farmer's & Mechanic's National Bank* v. *Wilkinson*, 266 U. S. 503.

But this procedure is one primarily to get at property rather than to get at a debtor. Without pushing the analogy too far, it may be said that the theoretical basis for this remedy is found in the common law actions to recover possession—detinue for unlawful detention of chattels and replevin for their unlawful taking—as distinguished from actions in trespass or trover to recover damages for the withholding or for the value of the property. Of course the modern remedy does not exactly

follow any of these ancient and often overlapping procedures, but the object—possession of specific property—is the same. The order for possession may extend to proceeds of property that has been disposed of, if they are sufficiently identified as such. But it is essentially a proceeding for restitution rather than indemnification, with some characteristics of a proceeding *in rem;* the primary condition of relief is possession of existing chattels or their proceeds capable of being surrendered by the person ordered to do so. It is in no sense based on a cause of action for damages for tortious conduct such as embezzlement, misappropriation or improvident dissipation of assets.

The nature and derivation of the remedy make clear that it is appropriate only when the evidence satisfactorily establishes the existence of the property or its proceeds, and possession thereof by the defendant at the time of the proceeding. While some courts have taken the date of bankruptcy as the time to which the inquiry is directed, we do not consider resort to this particular proceeding appropriate if, at the time it is instituted, the property and its proceeds have already been dissipated, no matter when that dissipation occurred. Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it violates an order of the referee, a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow. It should not be necessary to say that it would be a flagrant abuse of process to issue such an order to exert pressure on friends and relatives to ransom the accused party from being jailed.

II.

It is evident that the real issue as to turnover orders concerns the burden of proof that will be put on the

trustee and how he can meet it. This Court has said that the turnover order must be supported by "clear and convincing evidence," *Oriel* v. *Russell*, 278 U. S. 358, and that includes proof that the property has been abstracted from the bankrupt estate and is in the possession of the party proceeded against. It is the burden of the trustee to produce this evidence, however difficult his task may be.

The trustee usually can show that the missing assets were in the possession or under the control of the bankrupt at the time of bankruptcy. To bring this past possession down to the date involved in the turnover proceedings, the trustee has been allowed the benefit of what is called a presumption that the possession continues until the possessor explains when and how it ceased. This inference, which might be entirely permissible in some cases, seems to have settled into a rigid presumption which it is said the lower courts apply without regard to its reasonableness in the particular case.

However, no such presumption, and no such fiction, is created by the bankruptcy statute. None can be found in any decision of this Court dealing with this procedure.[1] Language can, of course, be gleaned from judicial pronouncements and texts that conditions once existing may be presumed to continue until they are shown to have changed. But such generalizations, useful enough, perhaps, in solving some problem of a particular case, are not rules of law to be applied to all cases, with or without reason.

Since no authority imposes upon either the Court of Appeals or the Bankruptcy Court any presumption of law, either conclusive or disputable, which would forbid or dis-

[1] The Court of Appeals itself said: ". . . the Supreme Court has never decided in favor of the fictitious 'presumption' here invoked . . . ." 157 F. 2d 951, 954.

pense with further inquiry or consideration of other evidence and testimony, turnover orders should not be issued, or approved on appeal, merely on proof that at some past time property was in possession or control of the accused party, unless the time element and other factors make that a fair and reasonable inference.[2] Under some circumstances it may be permissible, in resolving the unknown from the known, to reach the conclusion of present control from proof of previous possession. Such a process, sometimes characterized as a "presumption of fact," is, however, nothing more than a process of reasoning from one fact to another, an argument which infers a fact otherwise doubtful from a fact which is proved.

Of course, the fact that a man at one time had a given item of property is a circumstance to be weighed in determining whether he may properly be found to have it at a later date. But the inference from yesterday's possession is one thing, that permissible from possession twenty months ago quite another. With what kind of property do we deal? Was it salable or consumable? The inference of continued possession might be warranted when applied to books of account which are not consumable or marketable, but quite inappropriate under the same circumstances if applied to perishable merchandise or salable goods in considerable demand. Such an inference is one thing when applied to a thrifty person who withdraws his savings account after being involved

[2] Other circuits have treated the presumption of continued possession as one which "grows weaker as time passes, until it finally ceases to exist" (C. C. A. 8th in *Marin* v. *Ellis*, 15 F. 2d 321) and as one "only as strong as the nature of the circumstances permit" and which "loses its force and effect as time intervenes and as circumstances indicate that the bankrupt is no longer in possession of the missing goods or their proceeds" (C. C. A. 4th in *Brune* v. *Fraidin*, 149 F. 2d 325. See also Comments in 95 U. of Pa. L. Rev. 789 (1947) and 42 Ill. L. Rev. 396 (1947).

in an accident, for no apparent purpose except to get it beyond the reach of a tort creditor, see *Rosenblum v. Marinello*, 133 F. 2d 674; it is very different when applied to a stock of wares being sold by a fast-living adventurer using the proceeds to make up the difference between income and outgo.

Turnover orders should not be issued or affirmed on a presumption thought to arise from some isolated circumstance, such as one time possession, when the reviewing court finds from the whole record that the order is unrealistic and unjust. No rule of law requires that judgment be thus fettered; nor has this Court ever so prescribed. Of course, deference is due to the trial court's findings of fact, as prescribed by our rules, but even this presupposes that the trier of fact be actually exercising his judgment, not merely applying some supposed rule of law. In any event, rules of evidence as to inferences from facts are to aid reason, not to override it. And there does not appear to be any reason for allowing any such presumption to override reason when reviewing a turnover order.

We are well aware that these generalities do little to solve concrete issues. The latter can be resolved only by the sound sense and good judgment of trial courts, mindful that the order should issue only as a responsible and final adjudication of possession and ability to deliver, not as a questionable experiment in coercion which will recoil to the discredit of the judicial process if time proves the adjudication to have been improvident and requires the courts to abandon its enforcement.

III.

Unlike the judicially developed turnover proceedings, contempt proceedings for disobedience of a lawful order are specifically authorized by two separate provisions

of the Act and are of two distinct kinds. The court is authorized to "enforce obedience by persons to all lawful orders, by fine or imprisonment, or fine and imprisonment." 11 U. S. C. 11 (a) (13). This creates the civil contempt proceeding to coerce obedience, now before us. There is also provision for a criminal contempt proceeding whose end is to penalize contumacy, the court also being authorized to "punish persons for contempts committed before referees." 11 U. S. C. 11 (a) (16). These contempts before referees are defined to include disobedience of resistance to a lawful order, and the statute provides for a summary proceeding before the District Judge who, if the evidence "is such as to warrant him in so doing," may punish the accused or commit him upon conditions. 11 U. S. C. 69.

The proceeding before us sought only a coercive or enforcement sanction. The petition asked commitment "until he shall have complied with the aforesaid turnover order." The commitment was only until he "shall have purged himself of such contempt by complying with the turnover order or until the further order of this court." Thus no punishment whatever was imposed for past disobedience, and every penalty was contingent upon failure to obey. This is a decisive characteristic of civil contempt and of the truly coercive commitment for enforcement purposes, which, as often is said, leaves the contemnor to "carry the key of his prison in his own pocket." *Penfield Co.* v. *Securities & Exchange Commission*, 330 U. S. 585. We thus have before us now a civil contempt of the same kind that was before the Court in *Oriel* v. *Russell*, 278 U. S. 358, 363. What we say, therefore, is not applicable to criminal contempt proceedings designed solely for punishment, and vindication of the court's flouted authority, such, for example, as a proceeding to sentence one for destroying or mutilating books of account or property in his possession which the court had ordered him to turn over.

The question now arises as to whether, in this contempt proceeding, the Court may inquire into the justification for the turnover order itself. It is clear however that the turnover proceeding is a separate one and, when completed and terminated in a final order, it becomes *res judicata* and not subject to collateral attack in the contempt proceedings. This we long ago settled in *Oriel* v. *Russell*, 278 U. S. 358, and, we think, settled rightly.

The court order is increasingly resorted to, especially by statute,[3] to coerce performance of duties under sanction of contempt. It would be a disservice to the law if we were to depart from the long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy. The procedure to enforce a court's order commanding or forbidding an act should not be so inconclusive as to foster experimentation with disobedience. Every precaution should be taken that orders issue, in turnover as in other proceedings, only after legal grounds are shown and only when it appears that obedience is within the power of the party being coerced by the order. But when it has become final, disobedience cannot be justified by re-trying the issues as to whether the order should have issued in the first place. *United States* v. *United Mine Workers*, 330 U. S. 259; *Oriel* v. *Russell*, 278 U. S. 358. Counsel appears to recognize this rule, for the record in the case now before us does not include the evidence on which the turnover order was

[3] For examples of statutory provisions, see Interstate Commerce Act, 49 U. S. C. § 12 (3); Securities Exchange Act of 1934, 15 U. S. C. § 78 (u) (c); Public Utility Holding Company Act of 1935, 15 U. S. C. § 79 (r) (d); Communications Act of 1934, 47 U. S. C. § 409 (d); National Labor Relations Act, 29 U. S. C. § 161 (2); Federal Trade Commission Act, 15 U. S. C. § 49; Administrative Procedure Act of 1946, 5 U. S. C. § 1005 (c); and Atomic Energy Act of 1946, 42 U. S. C. § 1816 (d).

based. We could learn of it only by going outside of the present record to that in the former case, which would be available only because an application was made to this Court to review that earlier proceeding.

We therefore think the Court of Appeals was right insofar as it concluded that the turnover order is subject only to direct attack, and that its alleged infirmities cannot be relitigated or corrected in a subsequent contempt proceeding.

IV.

But does this mean that the lower courts "must thus affirm orders which first direct a bankrupt 'to do an impossibility, and then punish him for refusal to perform it.'"?

Whether the statement by the Court of Appeals that it knows Maggio cannot comply with the turnover order is justified by the evidence in this record, we do not stop to inquire. We have regarded turnover and contempt orders, and petitions for certiorari to review them, as usually raising only questions of fact to be solved by the careful analysis of evidence which we expect to take place in the two lower courts. The advantage of the referee and the District Court in having the parties and witnesses before them, instead of judging on a cold record, is considerable. The Court of Appeals for each circuit also has the advantage of closer familiarity with the capabilities, tendencies, and practices of the referee and District Judge. Both lower courts better know the fruits of their course of decision in actual practice than can we. Consequently, we have been loath to venture a review of particular cases, especially where the turnover order carries approval of the referee, the District Court and the Court of Appeals.

However the court below appears to have affirmed the order for commitment in this case, by relying on the earlier

finding of previous possession to raise a presumption of wilful disobedience continuing to the time of commitment, even though that conclusion is rejected by the court's good judgment. While the court protests that such a presumed continuance of possession from the time of bankruptcy to the time of the turnover order is unrealistic, it seems to have affirmed the contempt order by extending the presumption from the time of the turnover order to the time of the contempt proceedings, although persuaded that Maggio had overcome the presumption if it were rebuttable.

The fact that the contempt proceeding must begin with acceptance of the turnover order does not mean that it must end with it. Maggio makes no explanation as to the whereabouts or disposition of the property which the order, earlier affirmed, declared him to possess. But time has elapsed between issuance of that order and initiation of the contempt proceedings in this case. He does tender evidence of his earnings after the turnover proceedings and up until November 1944; his unemployment after that time allegedly due to his failing health; and of his family obligations and manner of living during the intervening period. He has also sworn that neither he nor his family has at any time since the turnover proceedings possessed any real or personal property which could be used to satisfy the trustee's demands. And he repeats his denial that he possesses the property in question.

It is clear that the District Court in the contempt proceeding attached little or no significance to Maggio's evidence or testimony, although the Court gave no indication that the evidence was incredible. The District Court in its opinion cites only *In re Siegler*, 31 F. 2d 972, in which the Court of Appeals reversed a District Judge who, because he believed the bankrupt's testimony, had refused to commit him for contempt. The *Siegler* case and other cases decided by the Court of Appeals appar-

ently led the District Judge to conclude that no decision other than commitment of Maggio would be approved by that court.

Nor did the Court of Appeals reject this view. Indeed it affirmed the commitment for contempt because it considered either that present ability to comply is of no relevance or that there is an irrebuttable presumption of continuing ability to comply even if the record establishes present inability in fact. It seems to be of the view that this presumption stands indefinitely, if not permanently, and can be overcome by the accused only when he affirmatively shows some disposition of the property by him subsequent to the turnover proceedings. We do not believe these views are required by *Oriel* v. *Russell*, 278 U. S. 358, despite some conflicting statements in the opinion, which the Court of Appeals construed as compelling affirmance of the contempt decree.

This Court said in the *Oriel* case that "a motion to commit the bankrupt for failure to obey an order of the court to turn over to the receiver in bankruptcy the property of the bankrupt is a civil contempt and is to be treated as a mere step in the proceeding to administer the assets of the bankrupt as provided by law, and in aid of the seizure of those assets and their proper distribution. While in a sense they are punitive, they are not mere punishment—they are administrative but coercive, and intended to compel, against the reluctance of the bankrupt, performance by him of his lawful duty." 278 U. S. 358 at 363.

Of course, to jail one for a contempt for omitting an act he is powerless to perform would reverse this principle and make the proceeding purely punitive, to describe it charitably. At the same time, it would add nothing to the bankrupt estate. That this Court in the *Oriel* case contemplated no such result appears from language which it borrowed from a Circuit Court of Appeals opinion which, after pointing out that confinement often failed to

produce the money or goods, said, "Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I hardly need say that he would always have the right to be released as soon as the fact becomes clear that he cannot obey."[4] Moreover, the authorities relied upon in Chief Justice Taft's opinion[5] make it clear that his decision did not contemplate that a coercive contempt order should issue when it appears that there is at that time no wilful disobedience but only an incapacity to comply.[6] Indeed, the quotation from *In re Epstein*, cited

[4] 278 U. S. 358, 366, quoting from *In re Epstein*, (cited as *Epstein v. Steinfeld*), 206 F. 568, 569.

[5] 278 U. S. 358, 364.

[6] The late Chief Justice said ". . . the following seem to lay down more nearly the correct view," and cited *Toplitz* v. *Walser*, 27 F. 2d 196, a contempt case in which it is said (at p. 197) "The sole question is whether the bankrupt is presently able to comply with the turnover order previously made and, accordingly, whether he is disobeying that order . . . ."; *Epstein* v. *Steinfeld*, 210 F. 236, a turnover proceeding, in which the Court delineates both turnover and contempt procedures and states that a contempt order should not be issued unless there is present ability to comply; *Schmid* v. *Rosenthal*, 230 F. 818, a turnover case, citing *Epstein* v. *Steinfeld, supra*; *Frederick* v. *Silverman*, 250 F. 75, a contempt case, reciting the necessity for present ability to comply; *Reardon* v. *Pensoneau*, 18 F. 2d 244, a contempt case, holding the evidence there insufficient to establish present inability to comply; *United States ex rel. Paleais* v. *Moore*, 294 F. 852, involving a commitment for contempt, stating ". . . the court should be satisfied of the present ability of the bankrupt to comply . . . ."; *In re Frankel*, 184 F. 539, a contempt case in which the evidence was held insufficient to show present inability to comply; *Drakeford* v. *Adams*, 98 Ga. 722, a State contempt case requiring present ability to comply to be "clearly and satisfactorily established"; and Collier, Bankruptcy (Gilbert's ed., 1927) 652. The cumulative effect of these authorities seems clearly to be that, while a bankrupt's denial of present possession, standing

supra (note 4) also stated: "In the pending case, or in any other, the Court may believe the bankrupt's assertion that he is not now in possession or control of the money or the goods, and in that event the civil inquiry is at an end . . . ."[7]

The source of difficulties in these cases has been that in the two successive proceedings the same question of

---

alone may not be sufficient to establish his inability to produce the property or its proceeds, if the Court is satisfied, from all the evidence properly before it, that the bankrupt has not the present ability to comply, the commitment order should not issue.

Other decisions are to the same effect. See, for example, *American Trust Co. v. Wallis*, 126 F. 464; *Samel et al. v. Dodd*, 142 F. 68, *cert. den.* 201 U. S. 646; *In re Nisenson*, 182 F. 912; *In re Holden*, 203 F. 229, *cert. den.* 229 U. S. 621; *In re McNaught*, 225 F. 511; *Dittmar v. Michelson*, 284 F. 116; *In re Davison*, 143 F. 673; *In re Marks*, 176 F. 1018; *In re Elias*, 240 F. 448; *Freed v. Central Trust Co. of Illinois*, 215 F. 873; *In re Nevin*, 278 F. 661; *Johnson et al. v. Goldstein*, 11 F. 2d 702; *In re Magen*, 14 F. 2d 469; *id.*, 18 F. 2d 288; *In re Walt*, 17 F. 2d 588; *Clark v. Milens*, 28 F. 2d 457; *Berkhower v. Mielzner*, 29 F. 2d 65, *cert. den.* 279 U. S. 848; *In re Tabak et al.*, 34 F. 2d 209; *In re Weisberger*, 43 F. 2d 258. See also Collier, Bankruptcy (14th ed.) pp. 244–249; 2 *id.* pp. 535–542; 5 Remington, Bankruptcy (4th ed.) pp. 624–681; 8 C. J. S. pp. 681–686; 6 Am. Jur. § 369, pp. 752–753.

[7] Similarly, the following cases involving contempt orders for failure to pay alimony were cited (278 U. S. at 365) as illustrating rules of evidence concerning ability to comply, "much the same as are here laid down for bankruptcy": *Smiley v. Smiley*, 99 Wash. 577, affidavit as to lack of ability to comply being undenied, commitment for contempt by failure to pay held erroneous; *Barton v. Barton*, 99 Kan. 727, evidence held sufficient to justify commitment although it is said ", . . the defendant can not, of course, be committed for the failure to do something which is beyond his power . . ."; *In re Von Gerzabek*, 58 Cal. App. 230, a showing of inability to comply said to be "the most effectual answer" to a contempt order; *Hurd v. Hurd*, 63 Minn. 443, *Heflebower v. Heflebower*, 102 Ohio St. 674, and *Fowler v. Fowler*, 61 Okla. 280, defendant's evidence insufficient to establish inability to comply which would have prevented commitment.

possession and ability to produce the goods or their proceeds is at issue, but as of different points of time. The earlier order may not be impeached, avoided or attacked in the latter proceedings and no relief can be sought against its command. But when the trustee institutes the later proceeding to commit, he tenders the issue as to present wilful disobedience, against which the court is asked to direct its sanctions. The latter issue must be tried just as any other issue, and the court is entitled to consider all evidence relevant to it. The turnover order adjudges the defendant to be in possession at the date of its inquiry, but does it also cut off evidence as to non-possession at the later time? Thus, the real problem concerns the evidence admissible in the contempt proceeding. Of course we do not attempt to lay down a comprehensive or detailed set of rules on this subject. They will have to be formulated as specific and concrete cases present different aspects of the problem.

In *Oriel's* case, this Court said: ". . . on the motion for commitment the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order." This language the Court of Appeals has construed to mean that the accused can offer no evidence to show that he does not now have the goods if that evidence, in the absence of an affirmative showing of when and how he disposed of the goods, might tend to indicate that he never had them and hence to contradict findings of the turnover order itself. We agree with the Court of Appeals that the turnover order may not be attacked in the contempt proceedings because it is *res judicata* on this issue of possession at the time as of which it speaks. But application of that rule in these civil contempt cases means only that

the bankrupt, confronted by the order establishing prior possession, at a time when continuance thereof is the reasonable inference, is thereby confronted by a *prima facie* case which he can successfully meet only with a showing of present inability to comply. He cannot challenge the previous adjudication of possession, but that does not prevent him from establishing lack of present possession. Of course, if he offers no evidence as to his ability to comply with the turnover order, or stands mute, he does not meet the issue. Nor does he do so by evidence or by his own denials which the court finds incredible in context.[8]

But the bankrupt may be permitted to deny his present possession and to give any evidence of present conditions or intervening events which corroborate him. The credibility of his denial is to be weighed in the light of his present circumstances. It is everywhere admitted that even if he is committed, he will not be held in jail forever if he does not comply. His denial of possession is given credit after demonstration that a period in prison does not produce the goods. The fact that he has been under the shadow of prison gates may be enough, coupled with his denial and the type of evidence mentioned above, to convince the court that his is not a wilful disobedience which will yield to coercion.

The trial court is obliged to weigh not merely the two facts, that a turnover order has issued and that it has not been obeyed, but all the evidence properly before it in the contempt proceeding in determining whether or not there

[8] These conclusions are supported by the cases cited in the *Oriel* case as laying down "more nearly the correct view." See note 6, *supra*. Of course cases such as *Gompers* v. *United States* (233 U. S. 604), *Michaelson* v. *United States* (266 U. S. 42), *Prendergrast* v. *United States* (317 U. S. 412) and *Cooke* v. *United States* (267 U. S. 517), all involving criminal contempt charges, are of no relevance here, as we deal only with civil contempts. See text, p. 10.

is actually a present ability to comply and whether failure so to do constitutes deliberate defiance which a jail term will break.

This duty has nowhere been more clearly expressed than in the *Oriel* case:[9] ". . . There is a possibility, of course, of error and hardship, but the conscience of judges in weighing the evidence under a clear perception of the consequences, together with the opportunity of appeal and review, if properly taken, will restrain the courts from recklessness of bankrupt's rights on the one hand and prevent the bankrupt from flouting the law on the other . . . ."

Such a careful balancing was said to be required in turnover proceedings because "coercive methods by imprisonment are probable and are foreshadowed."[10] Certainly the same considerations require as careful and conscientious weighing of the evidence relevant in the contempt proceeding. At that stage, imprisonment is not only probable and foreshadowed—it is imminent. And, without such a weighing, it becomes inevitable.

V.

We deal here with a case in which the Court of Appeals was persuaded that the bankrupt's disobedience was not wilful. It appears, however, that the District Court did not, in the contempt proceedings, weigh and evaluate the evidence before it but felt bound almost automatically to order Maggio's commitment in deference to clear precedents established by the Court of Appeals. Moreover, the Court of Appeals affirmed the commitment order although it was convinced that Maggio was not deliberately disobeying but had established his contention that he was

[9] 278 U. S. at 364.
[10] 278 U. S. at 363.

unable to comply. On such findings the *Oriel* case would require Maggio's discharge even if he were already in jail. It is hardly consistent with that case, or with good judicial administration, to order his commitment on findings that require his immediate release.

When such a misapprehension of the law has led both courts below to adjudicate rights without considering essential facts in the light of the controlling law, this Court will vacate the judgments and remand the case to the District Court for further proceedings consistent with the principles laid down in this Court's opinion. *Manufacturers' Finance Company* v. *McKey, Trustee in Bankruptcy*, 294 U. S. 442, 453, *Gerdes, Trustee in Bankruptcy* v. *Lustgarten*, 266 U. S. 321, 327, and cases cited.[11] That practice is appropriate in this case in view of what has been said herein concerning the judgments below.

Vacated and remanded.

---

[11] *Cf. Kay* v. *United States*, 303 U. S. 1, 10; *Prairie Farmer Publishing Company* v. *Indiana Farmers' etc.*, 299 U. S. 156, 159; *Buzynski* v. *Luckenbach S. S. Co.*, 277 U. S. 226, 228.

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1947.

Joseph F. Maggio, Petitioner, *v.* Raymond Zeitz, as Trustee in Bankruptcy of Luma Camera Service, Inc.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 9, 1948.]

Separate opinion of Mr. Justice Black, in which Mr. Justice Rutledge concurs.

August 9, 1943, the referee in bankruptcy found that petitioner had possession of certain merchandise belonging to a bankrupt corporation and ordered him to turn it or the proceeds over to the bankruptcy trustee. In these contempt proceedings (April 18, 1945) the District Court found that petitioner had failed to prove he no longer had possession of the property, and ordered him to be held in jail until he delivered the property or its proceeds to the trustee.

Had the petitioner been charged with embezzling this same property after the 1943 turnover order, doubtless no one would even argue that a doctrine of res judicata barred him from introducing evidence to show that the turnover findings of possession were wrong, and that in truth, he did not have possession of the property or its proceeds either on, before, or after August 9, 1943, or April 18, 1945. One basic reason why the findings of fact in a turnover proceeding would not be res judicata in an embezzlement proceeding is that the burden of proof is different in the two types of proceedings. In the first, a turnover proceeding, "clear and convincing proof" is enough; in the second, embezzlement, "proof beyond a reasonable doubt" is required. The burden of proof is heavier in the embezzlement case because a judgment of

conviction may embody a criminal punishment, while a turnover judgment does not—it is merely an order for the surrender of property, similar to an order of delivery in a replevin suit.

There is no such reason for different measurements of proof in contempt and embezzlement cases; consequentially, the two are almost identical. Fine, imprisonment, or both can result from a conviction of either. Here if this contempt judgment is carried out against the petitioner, he might be compelled to remain in prison longer than he would had he been convicted and sentenced on a charge of embezzlement. It is true that if the court was correct in finding that petitioner had possession of the property or its proceeds (and if he still has it), he carries the keys of the jail in his pocket, because he can turn the property or proceeds over to the trustee at any time and thus get his freedom. The crucial question to petitioner in this contempt proceeding was whether he had possession of the property or its proceeds June 5, 1945. And that crucial question was decided against petitioner by the trial court without holding that the evidence was sufficient to prove beyond a reasonable doubt that petitioner still had possession of the property.

I am unwilling to agree to application of a doctrine of res judicata that results in sending people to jail for contempt of court upon a measure of proof substantially the same as that which would support the rendition of a civil judgment for the plaintiff on a promissory note, an open account, or some other debt. All court proceedings, whether designated as civil or criminal contempt of court or given some other name, which may result in fine, prison sentences, or both, should in my judgment require the same measure of proof, and that measure should be proof beyond a reasonable doubt. See *Gompers* v. *United States*, 233 U. S. 604, 610–611; *Michaelson* v. *United States*, 266 U. S. 42, 66–67; *Pendergast* v. *United States*, 317 U. S. 412, 417–418.

The foregoing is written on the assumption that the turnover-contempt procedure is legal, an assumption which I do not accept. I share the opinion of the Circuit Court of Appeals that this procedure is unauthorized by statute and that it should not be permitted to take the place of criminal prosecutions for fraud as apparently was done here.[1] This whole procedure flavors too much of the old discredited practice of imprisonment for debts—debts which people are unable to pay. For here, if petitioner did wrongfully dispose of the property, whether or not he was guilty of a crime, he was probably liable in some sort of civil action, basically similar to, if not actually one for debt. Had a judgment been obtained against him in such a civil case, I doubt if it would be thought at this period that the bankruptcy court could have thrown petitioner in jail for his failure to obey what would have been in effect a court order to pay the debt embodied in the judgment.

Furthermore, the finding of possession of the merchandise as of 1943 may rest on an evidential foundation firm enough to support a civil turnover order but it is too shaky to support a sentence to prison. Accepting that finding, however, the presumption of present or 1945 possession from the possible 1941 or 1943 possession achieves a procedural result which runs counter to basic practices in our system of laws. For as the District Court said, it gave the ~~Government~~ prosecution the advantage of

[1] "We would hold that a *turnover proceeding may not, via a fiction, be substituted for a criminal prosecution so as to deprive a man of a basic constitutional right, the right of trial by jury.* We would note, too, that one consequence of the fiction is that the respondent may be twice-punished for the same offense, since, if he is later indicted for violation of 11 U. S. C. A. § 52 (b), his imprisonment for contempt will not serve as a defense. We would add that nowhere in the Bankruptcy Act has Congress even intimated an intention to authorize such results, and that they stem solely from a judge-made gloss on the statute." *In re Luma Camera Service*, 157 F. 2d 951, 953-954.

a "presumption" which, of itself, was held to relieve the Government from offering further proof of petitioner's guilt in a case where forfeiture of his personal liberty and property was sought; it threw upon the petitioner the burden of proving his innocence.[2]

For the foregoing reasons, among others, I would reverse the judgment of the Circuit Court of Appeals, with directions that the petitioner be released and that no further contempt proceedings be instituted against him based on his refusal to obey the turnover order.

---

[2] In holding petitioner in contempt, the District Court said: "Respondent has not sustained his burden of satisfactorily accounting for the disposition of the assets by his mere denial of possession under oath." It then made the following finding of fact: "4. The respondent, Joseph F. Maggio, has wholly failed to comply with said turnover order, and he has failed to explain to the satisfaction of this court his failure to comply."

SUPREME COURT OF THE UNITED STATES

No. 38.—October Term, 1947.

Joseph F. Maggio, Petitioner,
v.
Raymond Zeitz, as Trustee in Bankruptcy of Luma Camera Service, Inc.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[February 9, 1948.]

Mr. Justice Frankfurter, dissenting.

This is one of those rare cases where I find myself in substantial agreement with the direction and main views of an opinion, but am thereby led to a different conclusion. Too often we are called upon to disentangle a snarled skein of facts into a thread of legal principles. In this case, the Court's opinion seems to me to snarl a straight thread of facts into a confusing skein of legal principles. It was the record in a prior case involving the same litigants that invited correction of a rule of bankruptcy administration in the Second Circuit. We denied review.[1] The record in this case precludes such correction, but the Court's opinion is an effort to whip the devil round the stump.

The precise question before us may be simply stated. The District Court ordered the bankrupt to turn over goods withheld by him from the trustee. On the basis of two prior cases,[2] the Circuit Court of Appeals affirmed this order, *per curiam*. 145 F. 2d 241. These earlier cases in turn relied on a previous case.[3] All three enforced

[1] 324 U. S. 841.

[2] *Robbins* v. *Gottebetter*, 134 F. 2d 843, and *Cohen* v. *Jeskowitz*, 144 F. 2d 39.

[3] *Seligson* v. *Goldsmith*, 128 F. 2d 977.

a rule of the Second Circuit that goods in the possession of a bankrupt on the day of bankruptcy are presumed to continue in his possession regardless of the time that may have elapsed. In all three cases, the Circuit Court of Appeals had affirmed the turnover orders although it was maintained that the bankrupts could not obey them.[4] Likewise, in all three cases, that court had declared its impotence to change what it regarded as an untenable rule of bankruptcy administration, although fashioned by it and not by this Court.[5] In almost imprecating language review and reversal by this Court in these cases were invited.[6] In one of these cases, the bankrupt filed a petition for certiorari, which this Court denied.[7] Then came the prior case involving the litigants now before us, with this Court's refusal to review the turnover order. To be sure, the denial of a petition for certiorari carries no substantive implications. Reference to it here is relevant as proof of the finality with which the turnover order, as affirmed by the Circuit Court of Appeals, was invested.

In *Oriel* v. *Russell*, 278 U. S. 358, a unanimous bench, including in its membership judges of wide experience

---

[4] *Seligson* v. *Goldsmith*, 128 F. 2d 977, 978–79; *Robbins* v. *Gottebetter*, 134 F. 2d 843, 844; *Cohen* v. *Jeskowitz*, 144 F. 2d 39, 41 (concurring opinion of Frank, J.).

[5] Presumably, this avowed inability of the Circuit Court of Appeals for the Second Circuit to free itself from its own prior decision in this situation is not the reflection of a principle similar to that which binds the House of Lords to its past precedents. It must be attributable to the fact that the Second Circuit has six circuit judges who never sit *en banc* and that presumably they deem it undesirable for the majority of one panel to have a different view from that of a majority of another panel.

[6] 128 F. 2d at 979; 134 F. 2d at 844; 144 F. 2d at 40–41.

[7] In the first two of these cases, the bankrupt did not seek review in this Court; in the *Jeskowitz* case, the bankrupt took the hint, but this Court denied certiorari. 323 U. S. 787.

with bankruptcy law,[8] held that upon a citation for contempt to compel obedience of a turnover order the issues adjudicated by that order could not be relitigated. That case decided nothing if it did not decide that what the turnover order adjudicated—that the bankrupt withheld certain property from the bankrupt estate and was still in control of this property on the day he was ordered to turn it over—is the definitive starting point for contempt proceedings to exact obedience to the turnover order. In short, the contempt proceedings must proceed from the turnover order and cannot go behind it. We should not ignore this relevant sentence in *Oriel* v. *Russell:* "Thereafter on the motion for commitment (the only evidence that can be considered is the evidence of something that has happened since the turnover order was made showing that since that time there has newly arisen an inability on the part of the bankrupt to comply with the turnover order." [9]

The Court today reaffirms *Oriel* v. *Russell.* At the same time it makes inroad on the practical application of *Oriel* v. *Russell.* On virtually an identical record [10] it reverses where *Oriel* v. *Russell* affirmed. The nature and scope of the inroad are uncertain because the Court's opinion, to the best of my understanding, leaves undefined how the District Court is to respect both *Oriel* v. *Russell* and today's decision.

About some aspects of our problem there ought to be no dispute. We are all agreed that while the bank-

[8] Judge A. N. Hand's observation concurring, in the *Robbins* case, 134 F. 2d at 845 is also pertinent: ". . . all the justices of a court of which those exceptionally alert guardians of civil rights, Justices Holmes, Brandeis and Stone, were members, unanimously concurred in the opinion of Chief Justice Taft . . . ."

[9] 278 U. S. at 363.

[10] See Appendix.

rupt cannot relitigate the determination of a turnover order that he had such and such goods on the day of the order, he can avoid the duty of obedience to that order if he "can show a change of situation after the turnover order relieving him from compliance." [11] The right to be relieved from obeying the turnover order by sustaining the burden of inability to perform, on proof of circumstances not questioning the turnover order, has never been disputed. Again, if a judgment of civil contempt is rendered and the bankrupt is sent to jail until he chooses to obey the court's command, he will not be kept there when keeping him no longer gives promise of performance. *Oriel* v. *Russell* so pronounced.[12]

And so, since the fact that the bankrupt had possession of the goods on the day of the turnover order is a fact that cannot be controverted or relitigated because his possession of the goods on that day was the very thing adjudicated, the case reduces itself to this simple question: Where, on failure to obey the turnover order, the bankrupt stands mute, offers no evidence as to a change of circumstances since the order or offers evidence of a kind which the District Court may justifiably disbelieve, has he met his burden of proof so as to preclude the District Court from enforcing obedience by commitment for civil contempt?

[11] 278 U. S. at 364.

[12] "'I have known a brief confinement to produce the money promptly, thus justifying the court's incredulity, and I have also known it to fail. Where it has failed, and where a reasonable interval of time has supplied the previous defect in the evidence, and has made sufficiently certain what was doubtful before, namely, the bankrupt's inability to obey the order, he has always been released, and I hardly need say that he would always have the right to be released, as soon as the fact becomes clear that he cannot obey.'" 278 U. S. at 366, quoting from Judge McPherson's opinion in *In re Epstein*, 206 F. 568, 570.

On the record and the findings of the District Court this is the precise question now presented. There is nothing else in the record, except Judge Frank's statement below that the bankrupt was ordered to perform although the court knew that it was impossible for him to perform.[13] But this assertion of "impossibility" was not derived from the record in these contempt proceedings. It derives from Judge Frank's familiar hostility to what he deems the unfairness of his court's rule of presumption in ordering turnover.[14] Judge Frank here merely repeats his conviction that a turnover order like that rendered against Maggio is an order to turn over goods which could not be turned over. But that was water over the dam in the contempt proceeding. To give it legal significance when enforcement of the turnover order is in issue is to utter contradictory things from the two corners of the mouth. It is saying that the turnover order cannot be relitigated—that we cannot go back on the adjudication that the bankrupt had the goods at the time he was ordered to turn them over—but we know he did not have the goods, so we contradict the turnover order and do not respect it as *res judicata*.

---

[13] "Although we know that Maggio cannot comply with the order, we must keep a straight face and pretend that he can, and must *thus* affirm orders which first direct Maggio 'to do an impossibility, and then punish him for refusal to perform it.'" 157 F. 2d at 955 (italics supplied). Judge Frank made this statement concerning the presumption of continued possession in turnover order proceedings, and was not addressing his remarks to the record before him in the contempt proceeding. The dictum began with this sentence: "Were this a case of first impression involving the validity of a turnover order, we would not accept such reasoning." 157 F. 2d 951, 953. The "thus" in his statement indicates hostility to the basis of the turnover order because of a virus which the lower court feels unable to extract but which automatically infects the contempt proceedings.

[14] "With the turnover order once sustained, the contempt order necessarily followed." *Id.* at 954.

I cannot reconcile myself to saying that we adhere to *Oriel* v. *Russell* and yet reject its only meaning, namely, that we cannot go behind the judicial determination made by the turnover order that the bankrupt on such and such a day had the enumerated goods. Moreover, the authorities relied upon in Chief Justice Taft's opinion [15] make it clear that his decision *did* contemplate that a coercive contempt order should issue when it appears that the bankrupt has introduced no evidence or, what is the same, evidence that may properly not satisfy the District Court by establishing incapacity to comply since the turnover order.[16] In this case, the District Court was entirely warranted in finding that the bankrupt had pro-

[15] 278 U. S. 358, 364.

[16] The Chief Justice said ". . . the following seem to lay down more nearly the correct view," and cited *Toplitz* v. *Walser*, 27 F. 2d 196, a Third Circuit contempt case in which it is said (at p. 197) "It therefore devolves upon the bankrupt in the latter [contempt] proceeding to show how and when the property previously adjudged in his possession or control had passed out of his possession or control . . . . The trouble with the evidence in the contempt proceeding, the only evidence properly here for review, is that it is directed to the issue of the bankrupt's possession and control of property at the date of bankruptcy raised and definitely decided against her in the turnover proceeding . . . . Though not in form this is in substance a collateral attack upon the now finally established turnover order, which of course is not permissible."; *Epstein* v. *Steinfeld*, 210 F. 236, a turnover proceeding, in which the Third Circuit delineated its procedure, different from that followed in the Second Circuit, whereby if the referee found a shortage at the time of bankruptcy the turnover order was automatically entered, and the question of present possession or ability to comply with that order was left open for possible contempt proceedings, the presumption of continued possession being applied in such proceedings since the bankrupt had to show that by reason of events occurring since the bankruptcy he was unable to comply (cf. *In re Eisenberg*, 130 F. 2d 160) (this distinction has no real bearing on the instant issue as to either collateral attack or the presumption of continued possession); *Schmid* v. *Rosenthal*, 230 F. 818, a Third Circuit turnover case,

duced no evidence to contradict the adjudication of the turnover order that he had the goods when he was told to turn them over, unless, in place of what is usually deemed

---

citing *Epstein* v. *Steinfeld, supra; Frederick* v. *Silverman*, 250 F. 75, a Third Circuit contempt case citing *Epstein* v. *Steinfeld, supra; Reardon* v. *Pensoneau*, 18 F. 2d 244, an Eighth Circuit contempt case, holding that the bankrupt had not met his burden of establishing present inability to comply, in which it is said (at pp. 245–46) "They [turnover orders] establish the bankrupt's possession and control on the day the referee's order was made. The burden was on him to show what disposition had been made of the $6,900. Until that showing is made relieving him of an intentional loss of its possession and control, it must be presumed that he still has it . . . . A bankrupt cannot escape an order for the surrender of property belonging to his estate 'by simply denying under oath that he has it.'"; *United States ex rel. Paleais* v. *Moore*, 294 F. 852, a Second Circuit *habeas corpus* case following a commitment for contempt, stating (at p. 857) "If, at the time the turn-over order was made, the books and papers were in the bankrupt's hands, the presumption is that they continued to be in his possession or under his control until he has satisfactorily accounted to the court of bankruptcy for their subsequent disposition or disappearance. The burden is upon him satisfactorily to so account for them. He cannot escape an order for their surrender by simply denying under oath that he no longer has them."; *In re Frankel*, 184 F. 539, a contempt case in which L. Hand, then a District Judge, refused to commit for contempt because he did not deem the turnover order binding as *res judicata*, but on rehearing reversed himself, holding that the bankrupt could not show present inability by evidence constituting an indirect attack on the turnover order, stating (at p. 542) "Therefore, insofar as the [turnover] order directs anyone to do anything, he may not in the contempt proceeding question the propriety of the direction; and insofar as the order determines an existing fact, which is necessary in law to the validity of the direction, he may not question its truth. To question such a fact is to question the validity of the direction which depends upon it, and is only an indirect way of reviewing the order. Therefore now to deny the fact that the bankrupt had the money in his possession is in this case to assert that the order directing him to pay it over was erroneous. On this account, therefore, that fact is concluded, once it be granted that it was necessary to the validity of the order,

evidence, an infirmity has been found to seep, by a process of osmosis, into the turnover order respect for which in its entirety is the starting point of our problem.

The time to have acted on the inference of impossibility of performance of the turnover order, or to have taken notice of the imprisoning rule of the Second Circuit as to the presumption of continued possession of a bankrupt's withheld goods, was when we were asked to review the Circuit Court of Appeal's denigrating affirmance of the turnover order.[17] When we declined to review that turnover order, it became a final and binding adjudication.

---

which I have shown. Quite reluctantly, therefore, I can only conclude that I was wrong originally to inquire into the merits, and that a commital must issue." The cumulative effect of these authorities is that a bankrupt's denial of present possession, standing alone, is not sufficient to establish his inability to produce the property or its proceeds, and that the bankruptcy court will not permit the bankrupt to prove present inability to comply with the turnover order by evidence which indirectly constitutes a collateral attack on that order.

[17] For almost forty years, the Second Circuit has tenaciously abided by the presumption of continued possession. While this presumption was previously *sub silentio* utilized (*e. g., In re Schlesinger*, 102 F. 117, affirming 97 F. 930), *In re Stavrahn* in 1909, 174 F. 330, appears to have been the Second Circuit's case of first impression, and the decision that sired the presumption. There the court stated that the bankrupt could not defend against a contempt citation following a turnover order on the assertion that he had never taken the assets in question, but had to come forward with some reasonable explanation as to what had become of the assets since the turnover order. In 1912, the Second Circuit reiterated the reasoning of its earlier decision in *In re Weber Co.*, 200 F. 404. The presumption had been somewhat inarticulately phrased in the earlier opinion, and the court in this case commended the District Judge for aptly carrying out the mandate of the *Stavrahn* decision. The cases up to 1925 and before the *Oriel* case are listed and discussed at length in *In re H. Magen Co.*, 10 F. 2d 91, in which the court observed that "The law relating to turn-over orders is pretty well established in this circuit." 10 F. 2d at 93. *In re Siegler*, note 18 *supra*, was decided three months after this Court's decision

Neither court below was under a misapprehension as to the applicable law in the instant contempt proceeding. The District Court relied on *In re Siegler*, 31 F. 2d 972. But surely reliance on a case that was correctly decided is hardly an indication of misapprehension of law. If the *Siegler* decision had preceded instead of followed [18] *Oriel* v. *Russell*, it might well have been one of the authorities relied upon in Chief Justice Taft's opinion.[19] Nor do we have to speculate as to whether Judge Frank's conclusion that Maggio was unable to comply was based on evidence in this record or on doubt as to the propriety of the turnover order. We have the same printed record before us that he had and it is barren of such evidence. Presumably Judge Frank did not travel outside this record and act on undisclosed private knowledge. The whole course of this issue in the Second Circuit in recent years makes it obvious that his observation was merely another animadversion on that Circuit's practice in issuing turnover orders. The Circuit Court of Appeals did not purport to make an independent evaluation of Maggio's evidence bearing on his incapacity to obey the turnover order. It was beyond its power to do so. The Circuit Court was not at large. Its power was limited to a consideration of the justifiability of the District Court's findings on the basis of the record before that court.

---

in the *Oriel* case. Then came: *Danish* v. *Safranski*, 93 F. 2d 424; *In re Pinsky-Lapin & Co.*, 98 F. 2d 776; *Seligson* v. *Goldsmith*, note 3 *supra*; *Robbins* v. *Gottebetter*, note 2 *supra*; *Cohen* v. *Jeskowitz*, note 2 *supra*; and the *per curiam* affirmance of the turnover order in the instant bankruptcy proceedings.

[18] "Any difference of opinion respecting the force and effect of a turnover order, which may have prevailed before the decision of the Supreme Court, in *Prela* v. *Hubshman*, [companion case to *Oriel* v. *Russell*] . . . is now out of place in any discussion of the subject." 31 F. 2d at 973.

[19] Cf. *In re Frankel*, note 16 *supra*.

The cure for this procedural situation, if cure is called for, is correction of the rule of the Second Circuit regarding presumptions in turnover orders.[20] It ought not to be dealt with indirectly and at the cost of beclouding the doctrine of *res judicata* in proceedings for civil contempt. If Maggio has become the unhappy victim of the procedural snarl into which the Circuit Court of Appeals for the Second Circuit has involved itself by its decisions on the appeals of turnover orders and by this Court's refusal to review such adjudications, the law is not without ample remedies. The District Court has power to discharge a contemnor when confinement has become futile, or release may be had through use of *habeas corpus*, which, in the now classic language of Mr. Justice Holmes, "cuts through all forms and goes to the very tissue of the structure. It comes in from the outside, not in subordination to the proceedings . . . ." *Frank* v. *Mangum*, 237 U. S. 309, 346. These are means available to correct whatever specific hardship this case may present without generating cloudiness indeterminate in range upon a legal principle of such social significance as that of *res judicata* and upon a remedy so vital as civil contempt for the sturdy administration of justice.

How is the conscientious District Court to carry out the directions conveyed by the Court's opinion? If the District Court gives unquestioned respect, as it is told to do, to the turnover order of August 9, 1943, it will start with the fact that on August 9, 1943, the bankrupt was able to comply with that order. With that as a starting-point will the District Court not be entitled to find again, as it has already found,[21] that nothing pre-

[20] Cf. *Brune* v. *Fraidin*, 149 F. 2d 325.

[21] In the opinion dated April 18, 1945, holding petitioner in contempt of court, the District Court stated that: "Respondent [petitioner here] has not sustained his burden of satisfactorily accounting

sented by the bankrupt in exculpation for not complying with the turnover order disproves that he continued to have the property, which he was found to have had as of August 9, 1943. If the District Court should so find, would not the Circuit Court of Appeals and this Court if the case came here for review, be under duty bound to hold that, on the basis of the situation as adjudicated by the turnover order, the District Court could reasonably make such a finding? Or is the District Court to infer that in view of the snarl into which these proceedings have got by reason of the failure to upset the turnover order when directly under review, this Court was indulging in benign judicial winking—that while the fact of the possession of the property had been adjudicated by the turnover order and could not verbally be questioned, the District Court need not accept the determination of that order as facts? But if the District Court may so drain the adjudication of the turnover order of its only legal significance, why assert that *Oriel* v. *Russell* is left without a scratch? Why reaffirm that an adjudication sustaining a turnover order may not be relitigated when obedience is sought to such turnover order? These are questions which will confront not merely the district judge to whom this case will be remanded. After all, we are concerned with the practical administration of the Bankruptcy Act by district judges all over the United States.

By abstaining from expressing views regarding the requisites of a turnover order, I mean neither to agree nor disagree with observations made by the Court. There

---

for the disposition of the assets by his mere denial of possession under oath." And that court's fourth finding of fact was as follows: "The respondent, Joseph F. Maggio, has wholly failed to comply with said turnover order, and he has failed to explain to the satisfaction of this court his failure to comply."

has been opportunity in the past for adjudication of that matter, and there may be such an opportunity in the future. This case does not present it. From all of which I conclude that the judgment below should be affirmed, leaving for another day, when the occasion makes it appropriate, to consider directly and explicitly the principle that should govern the issue of turnover orders by bankruptcy courts.[22]

[22] "The proceedings in these two cases have been so long drawn out by efforts on the part of the bankrupts to retry the issue presented on the motion to turn over as to be, of themselves, convincing argument that if the bankruptcy statute is not to be frittered away in constant delays and failures of enforcement of lawful orders, the rule we have laid down is the proper one." 278 U. S. at 363.

APPENDIX.

Comparison between *Maggio* v. *Zeitz* and *Prela* v. *Hubshman* (companion case to *Oriel* v. *Russell*), 278 U. S. 358

	Identities		Differences	
	Maggio	Prela	Maggio	Prela
Name of bankrupt.			Joseph Maggio (R. cover).	Samuel Prela (R. cover)
Name of trustee.			Raymond Zeitz (R. cover).	Louis Hubshman (R. cover).
Type of property.			Photographic equipment (R. 2).	Silk (R. 1).
Date of proven possession.			Before Jan. 1, 1942 (324 U. S. 841, R. 13).	Before Nov. 22, 1924 (R. 1).
Date of petition in bankruptcy.			Apr. 14, 1942 (324 U. S. 841, R. 4).	Nov. 22, 1924 (R. 1).
Date of petition for turnover.			Jan. 7, 1943 (324 U. S. 841, R. 8).	July 1, 1925 (R. 5).
Interval between petition in bankruptcy and petition for turnover.	Eight months more or less.			
Trustee's proof of possession in bankrupt.	Examination of Maggio's inventories revealed discrepancies between sales and stock on hand at close of last inventory (324 U. S. 841, R. 7).	Prela manufactured blouses from silk; each blouse required 1½ yards of silk; examination of Prela's books revealed discrepancy between blouses manufactured and silk on hand (R. 1).		
Bankrupt's reply to above proof.	1. Inventory figures erroneous (unrecorded sales) (324 U. S. 841, R. 53-61). 2. Denial of present possession of the property. (*Id.* at 62.)	1. Assumption from books erroneous—manufactured a kind of blouse that required more than 1½ yards of silk (R. 2, 19). 2. Denial of present possession of the property. (*Ibid.*)		
District court's ruling on evidence.	1. Assumptions as to past possession correct (324 U. S. 841, R. 111).	2. Bankrupt's denial of present possession disbelieved. (R. 1, 5.)		
Date of turnover order.			Aug. 9, 1943 (R. 5).	July 8, 1926 (R. 3).
Interval between dates of proven possession and turnover order.	20 months more or less.			
Review of turnover order.	Unanimously affirmed by CCA 2 without opinion. L. Hand, Swan, and Clark, J. J., on Oct. 25, 1944 (145 F. 2d 241).	Hough, Mack, and L. Hand, J. J., on Dec. 13, 1926 (unreported) (R. 15).	Cert. denied Feb. 5, 1945, 324 U. S. 841.	
Date of trustee's petition for contempt citation.			Dec. 7, 1944 (R. 3).	April 22, 1927 (R. 13).
Trustee's proof of contempt.	1. Turnover order. 2. Failure to comply. (R. 13.)	(R. 13, 15.)		
Bankrupt's reply to above proof.	1. Did not have possession on date of turnover order. 2. Hasn't got it now. 3. Has become physically incapacitated. (R. 13, 17.)	(R. 17.)	3 (a). Heart trouble (R. 15). 4. Merely repeated denial (R. 13, 17).	3 (a). Paralytic stroke (R. 24). (b) Wife sick, too. (*Ibid.*, 25.) 4. Filed affidavits of former cutter, salesman, and blouse buyers to the effect that blouses in question used 2 and more yards of silk (R. 27, 28, 29).

Bankrupt's reply to above proof.	1. Did not have possession on date of turnover order. 2. Hasn't got it now. 3. Has become physically incapacitated. (R. 13, 17.)	(R. 17.)	3 (a). Heart trouble (R. 15). 4. Merely repeated denial (R. 13, 17).	3 (a). Paralytic stroke (R. 24). (b) Wife sick, too. (*Ibid.*, 25.) 4. Filed affidavits of former cutter, salesman, and blouse buyers to the effect that blouses in question used 2 and more yards of silk (R. 27, 28, 29).
District court's ruling on evidence.	1. Trustee makes out *prima facie* case by proof of non-compliance with turnover order. 2. Turnover order cannot be collaterally attacked by proving that bankrupt disposed of property prior to date of order to show present inability to comply with order. 3. To avoid contempt, bankrupt must prove present inability to comply by proof of disposition of property subsequent to turnover order. 4. Bankrupt makes no claim that he has disposed of the property since the turnover order. (R. 18, 19.) 5. Physical incapacity of bankrupt and/or bankrupt's wife ignored.	(R. 48, 52.)	6. Bankrupt's bare denial of present inability to comply with turnover disbelieved (R. 19).	6. Bankrupt's evidence and that of other witnesses that as a matter of fact bankrupt disposed of silk prior to turnover order excluded and/or stricken (R. 33-34, 45-46, 50, 54).
Date of contempt citation.			Apr. 18, 1945 (R. 19).	Sept. 9, 1927 (R. 52).
Interval between date of turnover order and date of contempt citation.	20 months.	14 months.	Certiorari to review turnover order applied for, opposed, and denied.	Certiorari to review turnover order not sought.
Review of contempt citation by CCA 2.	Affirmed. 157 F. 2d 951.	23 F. 2d 413.	Frank and L. Hand, J. J., with Swan, J., (concurring in the result.	Manton and Swan, J. J., with L. Hand, J., dissenting.
	1. "With the turnover order once sustained, the contempt order necessarily followed." Citing the *Oriel* case (at p. 954).	1. "A disobedience of the order to turn over presents a prima facie case of contumacy for punishment." Citing the CCA cases (at p. 414).		
	2. Findings in the turnover order proceeding are res judicata in the contempt proceeding. (*Ibid.*)			
	3. "That is to say" the district court "had to accept it as true" that Maggio had possession on the date of the turnover order and that "this possession continued . . . unless Maggio showed that, since August 9, 1943, he had been deprived of that possession or had in some other way become unable to comply with the turnover order." (*Ibid.*)	3. "Having been directed to turn over property, it is presumed that the offender continues in his willful and deliberate conduct when he fails to obey the order." (*Ibid.*)	3 (a). "Although we *know* that Maggio cannot comply with the order, we must keep a straight face and pretend that he can . . ." (at pp. 954-5). (Italics supplied.)	
	4. "As Maggio made no such showing of an intervening change of facts, there was no error in the entry of the contempt order." (*Ibid.*)	4. "No evidence was offered by the bankrupt to show what he had done with the property since he was adjudged a bankrupt" (at p. 413).		
	5. Physical incapacity of bankrupt and/or bankrupt's wife treated as irrelevant.			